183

S. HRG. 103–421

REVIEW OF THE MISSOURI RIVER MASTER WATER CONTROL MANUAL

Y 4.P 96/10:S. HRG. 103-421

Review of the Missouri River Master...

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

OCTOBER 11, 1993—GLENDIVE, MONTANA

Printed for the use of the Committee on Environment and Public Works

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REVIEW OF THE MISSOURI RIVER MASTER WATER CONTROL MANUAL

MONDAY, OCTOBER 11, 1993

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Glendive, MT.

The committee met, pursuant to notice, at 8:40 a.m. in the Petroleum Room, Holiday Lodge, 223 North Merrill, Glendive, Montana, Hon. Max Baucus (chairman of the committee) presiding.

Present. Senator Baucus.

Also present. Senator Conrad.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Good morning, everybody. I first want to welcome all of you to today's hearing on the review of the Army Corps of Engineers Missouri River Master Manual, a topic that is near and dear to our hearts for a good number of years, particularly during the drought years. I very much appreciate all of you coming. I know we have many friends here from North Dakota and South Dakota, as well, since this is a problem for all of us together in the Upper Missouri River Basin.

I am also very happy to be joined by one of my colleagues and one of our good friends, our neighbor to the east, Senator Kent Conrad from North Dakota. Kent is a very good friend of mine. We are allies together in most everything that we work on in the Senate because our interests in North Dakota and Montana are so similar.

Kent is also a real fighter. I don't know anybody in the Senate who digs deeper or is more tenacious for North Dakota than any other Senator for his or own State, than Kent Conrad.

So let's give a big Big Sky welcome to Kent Conrad.

[Applause.]

Senator BAUCUS. I would like to open this hearing with a trip back through time. The date is the early 1930's. The place is Fort Peck, a small trading post and military telegraph station.

Widespread unemployment and economic devastation from the Great Depression plagued the people of eastern Montana. Some of you here will remember that or have vivid recollections of it. Jobs were scarce. Economic prosperity was a distant dream. But all that was to change: the wild Missouri was about to be tamed. The Federal Government wanted to harness the power of the Big Muddy, to stop its unpredictable flooding, and to control its wanderings across the great west.

The news of the construction of Fort Peck Dam swept throughout eastern Montana. There were many promises made by the Federal Government: thousands of jobs for local workers; economic prosperity for eastern Montana; large irrigation projects for farmers; cheap hydropower for the region, and flood control.

But everything has its price. In Montana, we gave up over 167,000 acres of land in six counties for Fort Peck Dam and Reservoir. Add in the Dakotas, and the upper basin States gave up 1.2 million acres of prime river bottom land for the reservoirs and dams, and local governments gave up the tax base associated with the land.

But we trusted the Government's promise that we would share in the economic benefits of the Missouri River reservoir system.

On October 3, 1937, President Franklin Delano Roosevelt stood on the shore of the Missouri River at Fort Peck, in the shadow of the massive scaffolding from the construction of Fort Peck Dam, just four years after construction. He looked out over the faces of over 20,000 Montanans who had traveled hundreds of miles to hear him speak. Here is what President Roosevelt said:

> The Nation has understood that we are building for future generations of our children and grandchildren, and that in the greater part of what we have done, the money spent is an investment which will come back a thousand-fold in the coming years.

Now, 56 years later, we are still looking for these investments to pay off.

Before this year's rains, five years of drought have crippled the Missouri River basin. Fort Peck and the other upper basin lakes have been bled to support downstream barge traffic.

As this picture—you can see it over here, on my right—taken at Fort Peck marina shows, newly constructed boat ramps led down to weedy fields, miles away from the water of the lake. This looks good if you compare it with Crooked Creek, where it's even worse. The large irrigation projects promised to the farmers back in the 1930's have since been deauthorized and never built. Time and again, when money is given out to improve recreational areas, Fort Peck has been left out.

But things are finally starting to turn around. Record rainfall and runoff this year have helped to almost fill Fort Peck, Oahe, and Sakakawea. At my request, funds from the Army Corps have been used to pave the marina road at Fort Peck. A Memorandum of Agreement among the Corps, BLM, and Montana Fish, Wildlife and Parks is almost finished, which will help to provide long-term management at the Hell Creek recreation area near Jordan. With hard work and persistence, the people of eastern Montana are finally starting to see some of the promised economic benefits of which President Roosevelt spoke.

As Ken Byerly of the Lewiston News Argus has written, "Solving this problem is like eating an elephant: you take it one bite at a time." Well, we've taken a few bites, but there's still plenty of elephant left in the deep freeze.

As you will hear today, the Corps has been managing the Missouri River basin based on outdated economic assumptions from the 1940's. Economic benefits from recreation, tourism, fish, and

wildlife have been ignored when making water management decisions.

It is time for a change. It is time to take a fresh look at the Missouri River basin not as a series of isolated dams and reservoirs, but as a whole, integrated, multipurpose system. And it is time—high time—for the Corps to fully recognize the social and economic value of recreation on this great river.

That is why we are here today, to listen to all of you from the area, for you to tell us what your experiences and opinions are about the Missouri River, what she means to all of you—not only economically, but personally. We are going to ask the Corps some tough questions about its management of the reservoir system and we expect straightforward answers. I want to make sure that FDR's promise of rewards to future generations has not been forgotten.

I would like to turn to our friend Senator Conrad.

OPENING STATEMENT OF HON. KENT CONRAD, U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator CONRAD. Thank you very much, Senator Baucus.

Let me just echo what Senator Baucus said with respect to our being allies. I can remember very well when we teamed up to hold up the nomination of a new head of the Corps of Engineers several years ago in order to get fair treatment for the upstream States. That set off quite a controversy in the Senate chamber, that we were holding up for days, weeks, and ultimately months, a nomination to so important a post.

But one thing we have learned is that if the upper basin States are to get fair treatment, sometimes we must take very hard action. That is the reality. The downstream States have the numbers; they have the larger populations; they have more Representatives in the House of Representatives and the United States Senate than do the upstream States. So for us just to get fair treatment, what we legitimately deserve to receive based on the facts, takes vigilance and a willingness to act.

I am very pleased to be here today with Senator Baucus, who has demonstrated both of those qualities, vigilance and a willingness to act. Frankly, sometimes you have to be downright "Montana stubborn" in order to get the Corps' attention. Some of us in North Dakota have a little bit of that streak of stubbornness too, which I think has proved valuable in this fight.

Let me just say to you that four years ago I held similar hearings in the State of North Dakota, and if you go back four years ago, all of you will remember the conditions that we faced at the time. We were confronting the worst drought since the 1930's. All across North Dakota, fields were drying up; the reservoir was being drained—it was down, first 8 feet, then 12 feet, then 16 feet, then 20 feet. And when I held my first hearing, I must say, you could have bowled me over when I learned that during the depths of the worst drought in 40 years, we were having the Corps make the biggest releases from that reservoir in eight or nine years. It didn't make any sense. It didn't make any sense at all. But the Corps was functioning according to the requirements of the Master Manual. We knew then, as we know now, that that Master Manual is badly

out of date. That Master Manual assumes that we were going to have a time when there would be 12 million tons of barge traffic downstream, 12 million tons. Do you know what's the biggest year they ever had? It was 3.3 million tons. Today they are doing about 2 million tons.

So the underlying assumptions that drive the Master Manual just don't make any sense. They are out of date and need to be changed.

It's not just with respect to barge traffic. We also know that recreation was downplayed when the Master Manual was originally devised. It was downplayed because people did not anticipate the tremendous growth that recreation would experience in the upstream States and its economic importance. We now know from the work that has been done in the preliminary assessment of benefits that recreation is $67 million a year; navigation, $14 million. So recreation is far more important economically than is navigation, over 4 to 1 in terms of its importance, but it was given short shrift—again, another signal that the Master Manual is simply out of date.

So that's why this hearing is important. The Master Manual is now going through a review, and we have some questions to ask about the direction of that review. Basically, our motivation is simple: we want fair treatment. We understand there are legitimate downstream interests, as there are legitimate upstream interests. We understand that recreation deserves a focus, as does barge traffic. But we want them given the appropriate focus, fair treatment. That's what we ask for and that's what we'll insist on.

I want to thank Chairman Baucus for holding this hearing. I was asking Max this morning how old he is. Max is only 51 years old, and here he is, chairman of a major committee, the Environment and Public Works Committee. He is also the ranking Democrat on the Finance Committee, which means that at some point he will be chairman of the Finance Committee, which is the most powerful committee in the United States Senate. So Montana has a lot of clout. You have a lot of clout because your senior Senator here has a lot of clout. It is remarkable for a man 51 years old to be in the positions of responsibility that Max Baucus has. I just say to you that these are very, very important points not only for Montana but for all of us upstream, because his clout is ours and his power and his position help us assure that we get fair treatment.

Again, Mr. Chairman, thank you for holding this hearing today.

Senator BAUCUS. That means we have to produce now. [Laughter.]

[Applause.]

Senator BAUCUS. Thank you very much.

I would now like to turn to the first panel. I will introduce the panel for everyone's benefit, and also remind the panelists to speak only five minutes. We have three panels and we don't have a lot of time. We will be able to get to everyone if we all stay within our time limits. I will encourage Senator Conrad and myself to restrain ourselves, too, so that we can get to all the panelists and give each panel a fair shake.

The first panel includes Mr. James Duffus. Mr. Duffus is Director of Natural Resources Management Issues of the Resources,

Community, and Economic Development Division of the United States General Accounting Office, better known as the GAO. The GAO is an arm of the Congress which does excellent work. It is nonpartisan. It basically examines various Government functions and operations and I think they do an excellent job. It's an independent and objective outfit.

Next is Colonel John Schaufelberger. Colonel Schaufelberger is the Division Engineer at the Omaha Division of the Army Corps of Engineers, essentially responsible for the management of the basin.

Mr. Mark Simonich, Director of the Department of Natural Resources in Helena. Mark has been very active with this issue in various capacities over the years.

Mr. Dave Sprynczynatyk, State Engineer of the North Dakota State Water Commission. Dave, welcome to Montana.

And Mr. Robby Roberts, Secretary of the South Dakota Department of Environment and Natural Resources.

So let's begin with you, Mr. Duffus.

Your statements will be included in the record. I encourage you to summarize. We can give each of you only five minutes, so try to do the best you can within that five minutes. We have an egg timer here, so when you hear the timer bell go off figure out a way to summarize and wrap up.

OK, Mr. Duffus?

STATEMENT OF JAMES DUFFUS, III, DIRECTOR, NATURAL RESOURCES MANAGEMENT ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE, WASHINGTON, DC, ACCOMPANIED BY LEO GANSTER, ASSISTANT DIRECTOR; AND STANLEY G. FEINSTEIN, SENIOR ATTORNEY

Mr. DUFFUS. Thank you, Mr. Chairman, and Senator Conrad. With me today are Leo Ganster, GAO Assistant Director, and Stan Feinstein, a GAO Senior Attorney, who will be assisting me in responding to questions about our report.

I am pleased to be here today for the committee's hearing on the status of the revisions that the U.S. Army Corps of Engineers is making to its Missouri River Master Manual. As agreed, my remarks will be limited primarily to our January 27, 1992, report on the Corps' management of the Missouri River reservoir system under drought conditions in 1988, 1989, and 1990.

In summary, we reported that the Corps acted consistently with its drought contingency plan in releasing water from the reservoir system during the three years and all of the purposes served by the reservoirs were adversely affected except flood control.

The plan does not reflect current economic conditions in the Missouri River basin, although the Corps' ongoing revisions to its Master Manual are expected to address this issue.

Contrary to what the Corps believed, Federal statutes do not require the Corps to give recreation a lower priority than other project purposes—flood control, navigation, irrigation, and the generation of hydroelectric power—in major decisions about water releases.

Finally, the Congress should consider legislation requiring the Corps to establish priorities for operating its reservoir projects on the basis of the economic, environmental, social, and other benefits of all authorized purposes.

Conditions supporting the economic assumptions on which the Corps' drought contingency plan is based have changed over time. For example, in 1944 the Corps estimated the demand for river transport of goods at 12 million tons annually. Estimates developed in the 1950's reduced this projection to about 5 million tons by 1980. At the peak of commercial navigation in 1977, 3.3 million tons of goods were shipped on the Missouri River. As of 1988, the tonnage shipped on the river had declined further to 2.2 million tons. Conversely, other impacts were not anticipated in developing the plan, other impacts of recreational use of the reservoirs in terms of the revenues recreation industries could provide for North Dakota, South Dakota, and Montana.

The Corps is revising its Master Manual because information in the manual is outdated and because users of the Missouri River reservoir system have questioned the Corps' operation of it. In updating its manual, it is important that the Corps obtain the most complete and up-to-date information possible about the demand for water. For example, information we obtained during our review showed that visitors to the reservoirs spent about $65 million in 1988. On the other hand, gross revenues from barge companies were about $17 million in 1988. Further, a June 1991 report which assumed a complete loss of navigation on the Missouri River estimated that Missouri's net farm income would decline by more than $105 million in 1991. These are examples of the types of data the Corps should gather and use in reviewing various operating alternatives as it updates its manual.

At the time of our review, the Corps interpreted section 9 of the Flood Control Act of 1944, which authorized construction of the Missouri River reservoir system, to require that authorized purposes be categorized as either primary or secondary. The Corps also believed that secondary purposes, under which it included recreation, had to be relegated to a lower operating priority than primary purposes. As a result, according to the Corps, recreational use of the reservoirs was not a factor in the Corps' major decisions about water releases during the drought. Corps officials said they would not give priority to recreation over other purposes, even if their analysis showed that the change in priority could increase total benefits from the system, because of the Corps' position on primary and secondary purposes. They said that Congressional approval would be needed to change existing operating priorities.

As stated in our report, our review did not reveal a statutory scheme for categorizing project purposes as primary and secondary, and we see no appropriate statutory basis for precluding from consideration the economic and other benefits of any authorized purpose in establishing operating priorities for the reservoir system.

To ensure that the Corps maximizes the economic and other benefits of all authorized purposes of the Missouri River reservoir system and other Corps water projects, our report recommended that the Congress consider enacting legislation to require that the Corps establish operating priorities for its reservoir projects on the basis

of the economic, environmental, social, and other benefits to be derived from all authorized purposes.

Several changes have occurred since we issued our report almost 2 years ago, including the Corps' assurances that it will consider all authorized purposes equally as it revises its Master Manual. While we defer to the Corps concerning the specifics and status of their analysis and revisions, such a change in policy, if implemented, would be consistent with the thrust of our report.

Thank you, Mr. Chairman.

Senator BAUCUS. Thank you very much, Mr. Duffus.

Colonel Schaufelberger?

STATEMENT OF COLONEL JOHN E. SCHAUFELBERGER, DIVISION ENGINEER, OMAHA DIVISION, U.S. ARMY CORPS OF ENGINEERS, OMAHA, NE

Colonel SCHAUFELBERGER. Mr. Chairman and Senator Conrad, it's a great pleasure for me to be here today to testify before you regarding the status of the Missouri River Master Water Control Manual Review and Update.

The Master Water Control Manual, which we will call the Master Manual, was first developed in the 1950's and last revised in 1979, to provide for the method by which we operate the system.

The impacts associated with the recent drought prompted the Corps of Engineers to initiate a review of the current Master Manual in November of 1989. The purpose of that review is to determine if the current plan is the one that best meets the contemporary needs of the Missouri Basin. It consists of technical studies; alternatives development; and economic, environmental, and social impact assessments. It includes all environmental studies and public and agency involvement required by the National Environmental Policy Act and other statutes.

The search for a plan that best serves the contemporary needs of the basin has focused on potential changes in two primary factors. The first is the amount of storage reserved for permanent pool and for use during drought. The second feature being considered for change is the amount and timing of system releases for navigation, water supply, irrigation, power production, water quality, flood control, recreation, fish and wildlife, and environmental quality.

Specific changes in the quantity and timing of releases include changes in the criteria for flows for navigation service; length of navigation season; minimum releases during non-navigation periods; spring and summer releases to improve the river's ecosystem; regulation of the upper three reservoirs to improve fish production; and modifying releases to provide improved nesting habitat for the endangered interior least tern and threatened piping plover.

Alternatives are then compared in terms of economic and environmental performance. Economic factors include flood control, water supply, hydropower, recreation, and navigation. Environmental factors include wetlands and riparian habitat, interior least term and piping plover habitat, reservoir fish production, reservoir and river cold water fish habitat, river warm water fish habitat, physical habitat for native riverine fish, and the impact on historic properties.

A preferred plan for operating the system has not yet been identified. In accordance with policy, such a plan would provide the greatest economic benefit consistent with protecting the environment. Many alternatives provide nearly equal economic output. We have investigated ways to provide balanced output among the various environmental factors. Our biggest challenge is in developing alternatives that provide improved habitat for the endangered pallid sturgeon and good output in all economic areas. The primary tradeoff appears to be between pallid sturgeon habitat and navigation.

We have had great participation by a wide variety of diverse groups in the Master Manual review process. We have conducted 13 public meetings throughout the basin. We have worked with 10 other Federal agencies, 14 States, and the Missouri Basin Indian tribes. A number of the individuals who have been involved are taking part in today's hearing. We appreciate their continued support.

I do not exaggerate when I say we could not have accomplished this review without their technical help, advice, and wise counsel. That cooperation was demonstrated during the issue review conference which we recently held in Omaha. Affected States, as well as Indian tribes and Federal agencies, convened to discuss the technical adequacy of the preliminary draft Environmental Impact Statement.

These review efforts will provide a technically sound foundation for public review of the draft Environmental Impact Statement scheduled between March and July of next year.

Mr. Chairman, that concludes my statement.

Senator BAUCUS. Thank you very much, Colonel.

Mr. Simonich?

STATEMENT OF MARK SIMONICH, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES, MONTANA, HELENA, MT

Mr. SIMONICH. Thank you, Senator Baucus. I am here today on behalf of Governor Marc Racicot, and on behalf of the Governor I would like to thank you for holding this hearing today, and especially thank Senator Conrad and welcome him to the State of Montana.

I am the Director of the Department of Natural Resources. This department is the preeminent State agency in charge of managing and controlling State waters.

Even in the best of times, as you are well aware, Montana is a dry State. On average, we achieve only 11 to 15 inches of rainfall per year. Just to give you a comparison, that compares with about 39 inches annually in the Washington, D.C. area. So it is a very dry State, and we have been experiencing a severe drought for the past several years. You can see that we have been operating on a very thin margin for about the past eight years.

In eastern Montana, one bright spot in our economy has been the growth in tourism and recreation. Fort Peck Reservoir can become one of the premiere walleye fisheries in the country. Unfortunately, that growth and recognition has been threatened as a result of the Corps of Engineers' management of the Missouri River reservoirs

during the drought. For too long the Corps has operated the Missouri River and its system of dams as if there were no drought.

Montana and other upstream States gave up a lot of valuable land for the dams on the Missouri River, as you both noted earlier. The downstream States benefitted immediately from the dams with flood control and water for navigation and municipal water supplies. The upper basin States still have not received that economic benefit.

In light of these concerns, the Corps' present effort to review and update its Master Manual is long overdue. This review recognizes that the current Master Manual is outdated and that new interests, values, and needs must be adequately incorporated into the Master Manual.

At first, Montana was optimistic about this review. We have participated from the beginning and will continue to participate in that process. Montana has always taken it for granted that the Corps operated under the assumption that fish and wildlife and recreation, authorized purposes of the reservoir, were considered equal to other uses of the reservoir, so Montana was very disappointed early in the Master Manual review process to be presented with an August, 1990 letter from the Corps, a legal opinion, that stated that fish and wildlife and recreation were secondary uses. In short, that meant that the Corps could choose to operate the reservoirs so that fish and wildlife and recreation would simply receive whatever water was left over.

All Montana was asking for then, and all we continue to ask for, is fair and equal consideration. We know the Corps has a difficult job running the reservoirs, with all the competing demands for the resource, but we believe that the Flood Control Act of 1944 required the Corps to give equal consideration to fish and wildlife and recreation.

This was especially true for Fort Peck Reservoir, since the Federal law was amended in 1986 to specifically provide and emphasize that recreation is an authorized purpose of Fort Peck Reservoir.

When Montana and North and South Dakota found out that despite the review that was taking place, that fish and wildlife and recreation were relegated to the bottom of the priorities, we felt we were forced into the courts. What good was a Master Manual review process when the central premise was that we were only entitled to leftover waters? Montana and the Dakotas, therefore, in early 1991 filed a lawsuit in U.S. District Court asking for fair and equal consideration for fish and wildlife and recreation in the management of those reservoirs.

During our litigation, a transportation expert from Iowa State University, Dr. Phillip Baumel, demonstrated that the downstream States and the barge industry had produced bogus studies, inflating the importance of river transportation.

The Corps commissioned a study by the Tennessee Valley Authority of navigation economics on the Missouri River, but refused to release the full report to the upper basin States. In April, 1992, Judge Shanstrom, over the objections of the Corps, ordered the entire report turned over to Montana and the Dakotas for analysis.

This report was found to be unsupportable and biased toward navigation.

As a result of that litigation, the Justice Department in a March, 1992 letter to the upper States admitted that the authorized purposes were equal and that Congressional authorization was not necessary for the Corps to change its priorities.

Yes, sir.

That was also buttressed in a July, 1992 deposition by John Elmore, the Corps' highest ranking official.

Because the upper States had already achieved what they had been asking for, earlier this year Judge Shanstrom dismissed that suit. That was the second suit that had been filed by the upper basin States. The upper basin States have continued to file these suits because we believe that we have very severe drought restrictions in our States, and that the issues have not been completely resolved by the Corps of Engineers. Because of this, we will continue to act in good faith and follow through the process, but we will continue to look to the courts, if need be, to protect Montana's interests.

Thank you, Senator.

Senator BAUCUS. Thank you very much.

Mr. Sprynczynatyk?

STATEMENT OF DAVID A. SPRYNCZYNATYK, STATE ENGINEER, NORTH DAKOTA STATE WATER COMMISSION, BISMARCK, ND

Mr. SPRYNCZYNATYK. Thank you, Senator Baucus and Senator Conrad, and thank you for being here today to listen to our concerns about the management of the Missouri River. For the record, my name is David Sprynczynatyk. I am the North Dakota State Engineer, and I also serve as the Secretary and Chief Engineer for the State Water Commission.

Record-high precipitation and runoff this summer has ended much of the severe drought that has plagued the Missouri River basin for six years, but the effects of the drought linger. Unfortunately, the upper basin States have incurred a disproportionate share of the adverse impacts generated by lingering drought conditions. Because of the low reservoir level maintained during the drought, the upper basin States experienced substantial losses of water for authorized uses, such as water supply, agriculture, recreation, hydropower generation, and fish and wildlife. Below normal rainfall and snowfall were mostly responsible for the adverse impacts, but the Corps' reservoir management decisions, which are based on an outdated reservoir control manual, had severe consequences.

To put the potential drawdown in perspective, it is important to understand that under provisions of the unrevised manual—or the current manual—each of the big three reservoirs could be drawn down, on average, 70 feet from normal operating levels.

Basically, the Master Manual is the same document that was in place in 1960, although the contemporary uses of the river and the reservoirs have changed dramatically. In the face of these changes, which include conflicting objectives, interests, and varying hydrologic conditions, the need for an updated Master Manual became an urgent concern.

The Master Manual review consists of a two-phase study. Phase I was a limited effort, initiated in November of 1989 and completed in May of 1990. Phase I supported the belief of the upstream States that a revised Master Manual could provide greater economic and environmental benefits than the present Master Manual.

Phase II was initiated in July of 1990 and was to be completed by December of 1991. As of today, the Missouri River Basin States are anxiously waiting for Phase II final results. Repeated postponements mean that the earliest the Phase II review will be complete is 1995. After three and a half years of work, the Corps has released an eight-volume, 5,000-page preliminary draft Environmental Impact Statement for the Master Manual. The Corps has received more than 500 comments from Federal agencies, the States, and the Indian tribes on the preliminary draft EIS. The following are several of our most important concerns that must be addressed before public release of the revised Master Manual.

Number one, we urge the Corps to identify a preferred alternative in the draft Environmental Impact Statement. It is important for the Corps to commit to choosing a preferred alternative in their release of the draft EIS to the public which will provide the public with knowledge of which alternative the Corps believes provides direction for and reflects the current needs of the entire Missouri River basin.

Second, in an effort to move toward balancing the benefits, we have taken the position that the preferred alternative will need to provide a permanent pool level of no less than 44 million acre-feet. In other words, the preferred alternative should be selected from what's known as the "E series" in the preliminary draft EIS.

Number three, study conclusions thus far are biased because they are compared to the existing water control plan. The current water control plan is heavily weighted toward navigation and its tremendous water demands; therefore, any modification to higher permanent pools would obviously impact navigation. Instead, the Corps needs to give equal consideration to all uses by maximizing the benefits and then determining the best mix of optimized benefits.

Number four, navigation on the Mississippi River is not an authorized purpose of the Missouri River system, and we are pleased to note that the results of the study show that the Missouri River operations do not impact Mississippi River navigation.

Number five, the preliminary draft EIS is flawed because the navigation analysis is in error, and we feel that the Corps must modify its analysis. Also, we believe the Corps must expeditiously make the necessary changes to improve the preliminary draft EIS and more equally distribute the contemporary benefits.

In the Master Manual review process, environmental concerns may likely dictate a preferred alternative. We believe it is apparent that virtually any change from the current water control plan would benefit the overall environmental community.

It is also apparent that the Corps will have to meet legal environmental considerations throughout the Missouri River basin, such as the Endangered Species Act and water quality standards, and should maximize the output of the natural resource categories. Of primary concern is the troubled status of the cold water fishery

caused by the low lake levels, particularly at Lake Sakakawea. Steps must be taken to enhance reservoir cold water habitat by obtaining higher lake elevations. The North Dakota State Department of Health and Consolidated Laboratories are concerned that any drawdown below elevation 1830 at Lake Sakakawea will violate the State's water quality standards.

Since completion of the Missouri River mainstem reservoirs, the operation of those reservoirs has caused streambank erosion problems in the open reach of the river. We also believe these concerns must be addressed by the Corps as they complete this study.

Senator BAUCUS. I'm going to have to ask you to summarize.

Mr. SPRYNCZYNATYK. The last point I would like to make is that preliminary results show that it is possible to regulate the mainstem reservoirs in such a manner as to have significantly higher lake levels, while still meeting all downstream water requirements, and in fact, providing greater benefits to everyone, which includes additional security during low water periods.

In closing, we ask for fairness and equity and insist that the Corps modify its analysis in this regard. We feel that the Corps can expeditiously make the necessary changes to improve the preliminary draft EIS and more equally distribute the contemporary benefits.

Thank you.

Senator BAUCUS. Thank you very much, Mr. Sprynczynatyk.

Mr. Roberts?

STATEMENT OF ROBERT ROBERTS, SECRETARY, SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, PIERRE, SD, ACCOMPANIED BY JIM McCOWAN, EXECUTIVE DIRECTOR, PIERRE CHAMBER OF COMMERCE AND PIERRE ECONOMIC DEVELOPMENT CORP.

Mr. ROBERTS. Mr. Chairman, thank you very much. My name is Robert Roberts; I am Secretary of the South Dakota Department of Environment and Natural Resources. I am accompanied today by Jim McCowan, Executive Director of the Pierre Chamber of Commerce and Pierre Economic Development Corporation. I thank you for the opportunity to make this presentation.

While outlining the history of the current management of the river, I want to touch very briefly on four arguments, some of which have been referred to already.

First, the management of the river has not been consistent with the intention of Pick-Sloan.

Second, the management of the river has not complied with the O'Mahoney-Milliken amendment.

Third, current management of the river does not make economic sense.

And fourth, current management of the river does not make environmental sense.

When I say "management of the river," Mr. Chairman, I don't mean day-to-day operations of the Corps as much as I mean how the Nation has managed the river. In the 1940's, my State made a deal with the Federal Government as part of the Pick-Sloan plan. As you know, Pick-Sloan simply combined two plans: one for large dams, put forward by the Corps of Engineers, and the other for ir-

rigation projects, put forward by the Bureau of Reclamation. The deal was this: we would trade 520,000 acres of prime farmland for a series of dams and major irrigation projects. We gave up the land; we got the dams, and we got 3 percent of the promised irrigation projects.

We are no longer waiting for the remaining 97 percent of those projects because that isn't going to happen, and that isn't the kind of economic development that we need today. But I hope the committee understands, as is clear from their comments that they do, that we believe we did not receive what was promised to us, and that's why we say the management of the river has not been consistent with the intention of Pick-Sloan.

Because the upper basin States were suspicious of the rivers and harbors bill, they included an amendment, the O'Mahoney-Milliken amendment, which provided that water captured by the reservoirs could be used for navigation only if it did not conflict with use of water for other purposes. As things have developed, however, upstream consumptive uses have not been as important as the emerging upstream nonconsumptive uses, such as the use of water for fish and wildlife and recreation. The general consensus during the debate on that amendment was that the O'Mahoney-Milliken amendment subordinated navigation to other uses. But as you know, Mr. Chairman, that has not been the case, and we conclude that the management has not been consistent with the amendment.

Third, Mr. Chairman, current management of the Missouri River system does not make economic sense. Mr. Duffus has already referred to the report that the GAO made, and it has been touched on by a couple of the other speakers. Colonel Schaufelberger spoke of the meeting we had in Omaha two weeks ago. The plans currently being developed by the Corps include a maximum economic value for navigation of $17 million and a maximum economic value for recreation, counting only direct spending, of approximately $50 million. In other words, without using an economic multiplier to measure the total value of the recreation industry, it is already about 300 percent of the barge industry.

Let me make very clear that the Corps is not predicting these amounts for each industry. They have simply adopted the figures that exist for planning purposes. In other words, this is so clear an economic disparity that it isn't even controversial any more. We conclude from that, Mr. Chairman, that current management of the river does not make economic sense.

Finally, current management of the river does not make environmental sense. The system has been operated with environmental benefits considered as a secondary purpose, at best, but it seems clear that in the future environmental requirements will become even more important. Mr. Sprynczynatyk has touched on those environmental issues.

We conclude, Mr. Chairman, that the economic development benefits promised to the upper basin States by Pick-Sloan never happened. The protection of upstream rights promised by the O'Mahoney-Milliken amendment has not occurred, and current management of the river does not make economic or environmental sense.

There is an old line in the west, Mr. Chairman, that water runs uphill toward money and power. The Missouri River, on the other hand, runs downstream toward boats and Congress, not toward economic or environmental goals. The Master Manual review offers an opportunity to solve all four of those problems. I hope we take full advantage of it.

Thank you for the opportunity to make this presentation.

Senator BAUCUS. Thank you, Mr. Roberts.

[Applause.]

That was an excellent statement. Thank you very much.

I would like to begin with Mr. Duffus. You state in your report that there is no legal requirement that the Corps give preference to navigation over recreation; in fact, you state in your report that recreation must be given at least equal status to navigation. That is, the law makes that clear, in GAO's judgment, that recreation has equal status compared with navigation. Is that correct?

Mr. DUFFUS. That's correct, Mr. Chairman.

Senator BAUCUS. And what do you base that on? Is that just your reading of the statute? What's the reason for that?

Mr. DUFFUS. The basis for the Corps' categorization of project purposes as primary or secondary rose out of their conclusion that if a project purpose was not identified and had cost allocated to it, then it was not primary, it was secondary. It had to be relegated to a secondary purpose. In documents that they sent up to the Congress when the project was authorized in 1944 and approved, recreation was not allocated any cost. So it was on that basis that the Corps came to the conclusion that recreation was a secondary purpose.

Our review of the statute and our review of the legislative history found no basis for that.

Senator BAUCUS. Colonel, do you agree that there is nothing in the law that requires navigation to be given preference over recreation—or to ask the same question turned around, that the law in fact requires that equal emphasis be given to recreation as compared to navigation?

Colonel SCHAUFELBERGER. Sir, the law does not discriminate. The law says that in the purposes of the reservoirs—and they are enunciated—there is no priority established. So there is nothing in the law that says there has to be one priority over the other. The only priority established in the law is the O'Mahoney-Milliken amendment, which specifies that consumptive use has priority over other purposes. That's the only priority that I'm aware of that is specified by law.

Senator BAUCUS. But there is nothing in the law that gives preference to navigation over recreation?

Colonel SCHAUFELBERGER. That is correct, there is nothing in the law.

Senator BAUCUS. And you heard Mr. Roberts refer to the O'Mahoney-Milliken amendment which says that navigation is an authorized purpose, so long as it does not conflict with or detract from other uses. Is that correct?

Colonel SCHAUFELBERGER. Other consumptive uses, sir. Not other uses.

Senator BAUCUS. Would you comment on that please, Mr. Roberts.

Mr. ROBERTS. Yes, Mr. Chairman.

It does say "consumptive uses." It was pointed out during the debates on the Flood Control Act of 1944 that reservoir evaporation was a consumptive use when water was being stored for the production of electric power or for use in irrigation. We see no difference between that kind of storage and the kind of storage that is done for recreation and fish and wildlife purposes. We believe it is very clear that the O'Mahoney-Milliken amendment subordinates navigation to a secondary position in that case.

Senator BAUCUS. I think that's pretty clear, then, that recreation deserves at least equal treatment.

Mr. Duffus is it also true that the Corps' guidelines either require or encourage or give preference to the overall management of the plan that results in the greatest net economic development benefit? Is that correct?

Mr. DUFFUS. That's correct.

Senator BAUCUS. Could you amplify on that just a little bit, please?

Mr. DUFFUS. Yes. The Corps' regulations require that they follow the principles and guidelines set forth by the Water Resources Council, which in effect say that the economic, environmental, and social benefits of project purposes be considered in evaluating when they set their operating priorities.

Senator BAUCUS. Colonel, is that true? Do the Corps guidelines require that the system be managed according to the greatest net economic development benefits?

Colonel SCHAUFELBERGER. Sir, it requires it to be managed to the maximum net economic value, consistent with environmental requirements. So we must first meet the environmental requirements and accomplish those goals, and then we worry about the economics.

Senator BAUCUS. I understand what you're saying, but environmental considerations are extremely important, and Mr. Roberts particularly alluded to them, but putting that aside for a moment, do Corps guidelines still require that the management be according to the maximum net economic benefit?

Colonel SCHAUFELBERGER. Yes, sir. That is correct.

Senator BAUCUS. OK.

Now, is it also true that according to the Corps' own preliminary draft EIS, 44 million acre-feet yields the greatest net economic benefit?

Colonel SCHAUFELBERGER. It depends upon how you compute the economic value. If you look at simply the impact on the Missouri Basin itself, then the 44 million acre-feet produces the greatest net economic value by a factor of one-tenth of one percent. If you add the Mississippi impact, then 18 million acre-feet has the greatest maximum net economic value, again, by about one-tenth of one percent.

Senator BAUCUS. I'm sorry, I missed that. If you add the Mississippi, then what happens?

Colonel SCHAUFELBERGER. If you add the Mississippi impacts onto the Missouri River impacts, then the 18 million acre-feet per-

manent pool provides the maximum net economic value, but again, only by one-tenth of one percent. So as we look at the spectrum of alternatives that we've looked at in detail, we're unable to really discriminate because we're not convinced that the models that we have used are accurate to one-tenth of one percent.

So as we look at the alternatives, we believe that the real decision as to what alternative will ultimately be the preferred alternative is going to be driven by environmental factors. We have some Endangered Species Act requirements that we have to accomplish. But as we look at the total economics, averaged over the 93 years of record, it is true that if you only look at the Missouri Basin, by a one-tenth of one percent margin in the total dollars, the 44 million acre- foot permanent pool does provide the highest net economic value.

Senator BAUCUS. I'm curious that you would refer to the Mississippi because navigation is an authorized use for the Missouri River but not for the Mississippi. So why is the Corps even looking at this effect on the Mississippi?

Colonel SCHAUFELBERGER. The National Environmental Policy Act requires us to identify all impacts for any change we're considering. And since the Missouri River runs into the Mississippi River, we have to look at what the potential impacts are on the Mississippi for some change. So whether it's an authorized purpose or not, it does fit under the NEPA requirements that it has to be looked at, because it is——

Senator BAUCUS. I understand what you're saying, but the National Environmental Policy Act was written more from an environmental perspective, than from an economic perspective if at all. As to the maximum benefit of 44 million acre-feet yielding the greatest economic benefit, certainly for the Missouri States, it seems to me that that settles it because the statutes refer to navigation as an authorized use for the Missouri but not for the Mississippi. I don't think that navigation should be considered from the Mississippi point of view because it's not in the law.

Colonel SCHAUFELBERGER. As a consequence of the meeting that we had in Omaha at the end of September, there were comments that require us to look at some of the value functions, which may change which permanent pool and which flow series have the greatest economic output. But for the data that is displayed in the preliminary draft Environmental Impact Statement that you have in front of you, as you look at the 93 years of record, for our purposes, at a one-tenth of one percent discrimination factor it is hard to say, "This is the one that turns out to be the best."

Now, when you look at the seven alternatives that we looked at in chapter 5 for the 21 years from 1930 to 1950, which is the greatest drought of record, then there is a greater discrimination, and the 44 million acre-feet pool still is the best economic performer—in this case by about 2 percent, as opposed to the one-tenth of one percent when it is averaged across the 93 years. But as we modify the models, consistent with the input that we received at the Omaha meeting, those numbers may change.

Senator BAUCUS. I would like you to just reflect on this. The chart on the easel here is Corps data; Senator Conrad referred to this chart. Essentially, it shows that the economic value of recre-

ation is $67 million, whereas the economic value of navigation is only $14 million. That's the Corps' data; the Corps is the source of this. Do you validate or do you consider——

Colonel SCHAUFELBERGER. I don't know where that data came from. The data that is displayed in the preliminary draft Environmental Impact Statement indicates that the maximum national economic development value that you can get out of recreational use is $50 million, of which two-thirds is recreation on the six reservoirs and one-third is recreation on the river, either between the reservoirs or downstream. So I'm not familiar with the source of the $67 million.

Senator BAUCUS. Well, this is "Draft Phase I Report for the Review and Update of the Missouri River Mainstem Master Water Control Manual." So it's the Phase I report.

Colonel SCHAUFELBERGER. The Phase I report was a quick and dirty report that was done in a six-month period. Since then we have worked very closely with other Federal agencies and States to develop the value functions that are the underpinning of the preliminary draft Environmental Impact Statement. So for our purposes, that represents the best data we have today to depict the potential impacts to navigation and recreation and the other purposes due to some change in the way we operate.

Senator BAUCUS. But regardless of whether or not this is exact data, is it in the ball park? Does the Corps' data confirm that recreation generally has a three- to four-fold greater value than navigation?

Colonel SCHAUFELBERGER. Yes, sir. The data in this document indicates that navigation has a value of about $17 million, which is not too far removed from the $14 million shown on that chart; and depending on which alternative for operation you pick, recreation has about $50 million, which is in the proximity of the $67 million. It's in the same general area.

Senator BAUCUS. OK.

I have a lot more questions, but I would like to just turn the hearing over to Senator Conrad.

Senator CONRAD. Thank you, Mr. Chairman.

I would like to ask the Colonel, does the Corps have the legal authority to manage the Missouri River system for the benefit of the Mississippi River system?

Colonel SCHAUFELBERGER. Sir, we do not have the legal authority to operate exclusively for the Mississippi, but in the event of some type of declared emergency, either by the President or someone else, and the Missouri River could be used to supplement some of the problems on the Mississippi, we believe we have the authority to do so.

Senator CONRAD. Does the GAO agree with that?

Mr. DUFFUS. We would agree that the Corps does not have the legal authority to manage the Missouri River system solely for the benefit of the Mississippi River.

Senator CONRAD. Does not have the legal authority?

Mr. DUFFUS. Does not have the legal authority, correct.

Senator CONRAD. How about in the stated circumstances that the Colonel provided?

Mr. DUFFUS. I would have to defer to my attorney, Senator Conrad, to perhaps respond to that.

Mr. FEINSTEIN. Senator Conrad, we would not disagree that if there were an emergency of some kind, the operations of the Missouri could reflect whatever emergency situation, etc., was extant on the Mississippi system. But in normal operations, which is what I think we're talking about, nonemergency situations—and I think the emergency we're talking about is not one that encompasses drought—that the Missouri River system would be operated primarily for Missouri River purposes, and not for Mississippi River purposes.

Senator CONRAD. Colonel, would you agree with that?

Colonel SCHAUFELBERGER. Well, I agree, except I believe the modification of the operation of the Missouri River could occur for drought conditions if they were extreme, as well as for flood conditions, if there was some belief that some great economic impact downstream could be alleviated in some way by some activity. But that, I believe, would require a Presidential declaration of some form, an overriding sort of drought contingency or flood contingency operation, but not as a part of the normal day-to-day operations.

Senator CONRAD. So if I were to state your position, it would be that you do not have the legal authority to manage the Missouri River system for the benefit of the Mississippi River system unless there is a Presidentially declared emergency?

Colonel SCHAUFELBERGER. Solely for the benefit, because there is a benefit to the Mississippi by what we do on the Missouri. But our operating——

Senator CONRAD. But do you have the legal authority to manage the Missouri River system to benefit the Mississippi River system?

Colonel SCHAUFELBERGER. Solely the Mississippi? No.

Senator CONRAD. I didn't use the word "solely," I used the words carefully for a purpose; do you have the legal authority to manage the Missouri River system for the benefit of the Mississippi River system? Do you have the legal authority to do that?

Colonel SCHAUFELBERGER. The legal authority is there in emergency conditions, but that is in our view——

Senator CONRAD. And that would be a Presidential declaration of an emergency?

Colonel SCHAUFELBERGER. Of some type, yes, sir.

Senator CONRAD. Solely? Let's use the word "solely" there. Do you agree with that?

Colonel SCHAUFELBERGER. Yes, sir.

Senator CONRAD. All right. I think that's very important.

Senator BAUCUS. Also, in following on, there has been no Presidential declaration of emergency; is that true?

Colonel SCHAUFELBERGER. Say again, sir?

Senator BAUCUS. If you do not have the authority to manage the Missouri River basin for the benefit of the Mississippi unless there is a Presidential emergency, is it also true that so far there has not been a Presidential emergency declared, which means that the Corps does not have the authority to manage the Missouri for the benefit of the Mississippi?

Colonel SCHAUFELBERGER. For example, this year, sir, there was a Presidential declaration of flooding, and we modified the way we operate.

Senator BAUCUS. Was there a Presidential declaration specifically aimed at and directing the Corps to change its management of the Missouri for the benefit of the Mississippi?

Colonel SCHAUFELBERGER. No, sir. And I——

Senator BAUCUS. Therefore there was not a Presidential declaration?

Colonel SCHAUFELBERGER. Well, maybe I am not clear. What I was saying was that in the event the emergency itself was declared by the President on the Mississippi River—too much water or too little water, those are the two normal events—then we could be directed by the administration to take some action to improve conditions by withholding water or by adding water. I don't believe the declaration must specifically state that "you must do something on the Missouri River," but that there must be some sort of an emergency situation declared to allow us to deviate from the way we normally would operate in order to operate in some way to benefit specifically the Mississippi River. But I don't think it necessarily has to say "The President directs you to open a gate," or close a gate, I don't think that would happen.

Senator CONRAD. Let me pursue this further. Don't your own studies suggest that, in fact, managing the Missouri for the purposes of affecting navigation on the Mississippi is not affected? That is, if you manage the Missouri in a way to assist navigation on the Mississippi in one year, that you will have an offsetting negative effect in the following year? Don't your own studies show that?

Colonel SCHAUFELBERGER. Sir, the studies show that when you average what we could do across the years for the alternatives that we looked at in detail, we don't significantly impact the flow at St. Louis. That's what we looked at. So to operate every day, around the clock, in some way for the benefit of the Mississippi River, it really is insignificant, the amount that we can affect it.

However, we know that normally the amount of water that we release at Gavin's Point has a very small impact at St. Louis. In fact, normally, when we operate the Mississippi River, the amount of impact that we have on the river at Cairo, Illinois is 6 percent, a very small amount. So our ability to influence is very small.

During the drought period in 1988, however, the amount of water that we released from Gavin's Point was over 34 percent of the water that was in the Mississippi River at Cairo, Illinois. So in the case where you have a concurrent drought on all tributaries of the Mississippi River, we could have some significant impact. But that is such a rare event that it has to be dealt with, in our opinion, as a kind of drought contingency sort of thing; you deal with it, an emergency declaration is provided, and maybe you can do something and maybe you can't. But as far as operating on a day-to-day, year-in-and-year-out basis, we can't make much of an impact. That's what the charts that are in the preliminary draft Environmental Impact Statement show.

Senator CONRAD. In addition to that, as I think we've already established, you don't have the legal authority to manage the Mis-

souri River system for the benefit of the Mississippi River system unless there is a Presidentially declared emergency.

Let me ask this. Is the Corps now giving all project purposes equal consideration? Or does it still consider navigation to be a primary purpose and recreation a secondary purpose?

Colonel SCHAUFELBERGER. Sir, there are no primary or secondary purposes, but in reality if you look at the way we have structured the alternatives, there is a priority system. That priority system is that we are only going to manage the water that is left in the system; so where you have consumptive use, that water is taken out. That water is not available for our use in releasing. So as a practical matter, water taken out of the system for domestic use or industrial use or irrigation is considered a depletion, just like irrigation. So they get the first cut out of it. The river is not appropriated; it is not allocated by purpose, so those people who draw water out for consumptive use take the first priority out.

The water that is remaining, we try to balance it equally among all purposes. There is no priority among the other purposes.

Senator CONRAD. So the Corps has fundamentally changed their position from what the GAO found it to be?

Colonel SCHAUFELBERGER. We have changed the position that is currently laid out in the old Master Manual. The old Master Manual did have a priority that was established based on input from the Governors of the basin in 1953. Clearly, times have changed, and there is a priority system laid out in there. But in the Environmental Impact Statement that we're working on there is no priority, except that we only manage that water that is left. Those who take it out get the first priority.

Senator CONRAD. One last question if I could, Mr. Chairman.

This goes to the question of when you were doing the analysis for Master Manual review, did you analyze drought conditions, or did you analyze normal conditions for the purposes of establishing priorities?

Colonel SCHAUFELBERGER. Sir, we're not establishing priorities, but we looked at both conditions.

In our 93 years of record that we looked at, the worst drought conditions were in the 1930's. So we looked at what happens if you average across the 93 years of record, and then what happens if you use the period 1930 to 1950, where we had the greatest drought. What we found is that during the drought period there is a greater difference among the alternatives, because in reality what we're doing here is not managing the river; we're trying to figure out how to balance the negative impacts on the various purposes when you're short of water. When there's plenty of water, everyone has what they need. So we talk about how we allocate water; we're really not. We're trying to figure out who pays when you have a shortage.

Senator CONRAD. And what's your conclusion? I'm not asking you for a final preferred alternative, but I'm asking you for your conclusion with respect to the question of recreation versus navigation, if it is a water short period, who should be given the weight?

Colonel SCHAUFELBERGER. Sir, we tried to look at all purposes. What we have found out is if you are more conservative on use of the water earlier in the drought, all purposes benefit. So, we have

tried not to pick one versus the other. We have said that when you have drought years, there is an environmental impact; there is also an economic impact, so let's try to understand what happens to the various purposes, whether they be environmental or economic, when you are short water, and not trying to establish a weighting of one versus the other.

So we found that being more conservative when you are short water——

Senator CONRAD. If I can, what's the purpose of doing an economic analysis if it's not for the purpose of weighting? Are you telling me that all of this is just a waste of time? It would seem to me that we go through an economic analysis for the purpose of weighting. Now you're telling me that we don't weight it. How can that be?

Colonel SCHAUFELBERGER. Sir, they are weighted by the value, but a dollar of recreation versus a dollar of navigation or a dollar of water supply—it is still a dollar on the national economy. So we are not saying that a dollar for one purpose has a higher value than a dollar from another purpose.

Senator CONRAD. No, no. I understand that. But understand me; if you have one purpose that is $50 million, which is your latest number after it was previously $67 million, and navigation is $14 million, or $17 million under your most recent analysis, doesn't that tell you that recreation has a significant edge over navigation with respect to effect on the national economy?

Colonel SCHAUFELBERGER. Sir, what we are trying to look at here is, what is the impact on the purposes? So as the elevation of the reservoirs and the elevation of the water in the river changes, the question is, what is the impact on each of those purposes? So if there is a decrement of $5 million in recreation, clearly that would have greater value than a $2 million decrement to navigation. But we're using the dollars to allow us to compare the impacts on the various alternatives. The biggest output is hydropower and water supply——

Senator CONRAD. No, no, no. But precisely—this is my point—you used the dollars for the purposes of making a comparison, right?

Colonel SCHAUFELBERGER. Yes, sir.

Senator CONRAD. That's why we translate things into dollars. And when we do that, we find, as you have found, as GAO found, that recreation has a much bigger impact than does navigation. Am I correct, $50 million is bigger than $17 million?

Colonel SCHAUFELBERGER. Sir, I understand that. The question is the impact on the changing of the purposes.

Sir, what we have found is that by changing the permanent pool, when you average across the 93 years of record, from 18 million acre-feet to 44 million acre-feet, the net benefit to recreation is $1 million. And in navigation, the net impact in going from 18 million acre-feet to 44 million acre-feet is a minus $7 million.

Senator CONRAD. So with respect to the question of 18 million to 44 million, your conclusion is that navigation is more affected?

Colonel SCHAUFELBERGER. When you only look at those two purposes, absent the others, that is correct. Yes, sir.

Senator CONRAD. And what happens when you look at the other purposes?

Colonel SCHAUFELBERGER. It is a $10 million increase in hydropower. Flood control is about equal. Water supply is about equal. So the net of that tells me that when you combine the hydropower with the recreation, then in pure dollars that is the higher number. That's why I say that we have to look at all of them sort of equally, not just two in isolation.

Senator CONRAD. Let me ask you this. In your consideration of factual matters of substance here, have you been influenced by the fact that 70 Members of Congress sent a letter to the President of the United States?

Colonel SCHAUFELBERGER. I have not, no, sir.

Senator CONRAD. Do you believe the Corps has?

Colonel SCHAUFELBERGER. Sir, I don't believe the Corps has been. It remains to be seen how that plays out in the future, but to date there is a lot of correspondence about the politicization of this process. That may occur at some time in the future; it certainly has not occurred to date.

Senator CONRAD. And is it your commitment that it will not affect the recommendations and the findings in the Master Manual revision?

Colonel SCHAUFELBERGER. Sir, it will not impact my recommendations. But I am clearly not the decisionmaker. I will make a recommendation to Washington which will either be rejected, accepted, or modified. As the President indicated when he wrote the letter back to those 71 Members of Congress, he said that any proposed change would be subject to a thorough administrative review. How that plays out, that's way above my level to influence, but from what I can control, it is not going to impact me whatsoever, sir.

Senator CONRAD. You're not going to do this based on politics? You're going to do this based on substantive findings?

Colonel SCHAUFELBERGER. That is correct, sir.

Senator CONRAD. Thank you.

Senator BAUCUS. Thank you, Colonel.

I wonder if we could put another chart on the easel.

I alluded to these statistics when we spoke earlier. Basically, the chart indicates over on the left side a current pool level of 18 million acre-feet, yielding an economic benefit of $1.276 billion. Over on the far right, that bar indicates economic benefits of 44 million acre-feet, and that indicates a net economic benefit of $1.284 billion, roughly $8 million higher. These are Corps figures; this is from the preliminary draft EIS.

Is it true that the net economic benefit to the basin is higher—that's what this chart seems to indicate—at 44 million acre-feet compared with the current level of 18 million acre-feet?

Colonel SCHAUFELBERGER. Yes, sir. But the number that you have up there for the 18 million acre-feet permanent pool equates to the way the system is operated today, pursuant to the current Master Manual.

Senator BAUCUS. Right.

Colonel SCHAUFELBERGER. When we apply our more conservative release regime, without changing the permanent pool, that becomes

$1.282 billion. So when you compare the same sort of an operating rule, then the difference between the 18 million acre-feet permanent pool and 44 million acre-feet permanent pool is $2 million. That's where I came up with my two-tenths of one percent, when you compare similar methods of operation. The one you have up there is as compared to current operation, and it is correct. There would be a significant difference.

Senator BAUCUS. But even with the change that you've indicated—and we will have to look at that change and analyze it—even with that change, the conclusion is still true, that the net economic benefit is still higher, albeit not as much higher, but still higher at 44 million acre-feet compared with 18 million acre-feet?

Colonel SCHAUFELBERGER. That is correct, sir.

Senator BAUCUS. We have another chart here. This basically compares the current pool levels with 44 million acre-feet, and it shows that five States—this breaks it down to economic benefit change according to region. This shows that five States receive net economic benefit increases at 44 million acre-feet, and three States experience a loss.

Now, in each case, as you can tell by this chart, it's not a heck of a lot; that is, the green and the red, if you can see from that far away, are very close to each other. But nevertheless on the margin, at 44 million acre-feet, the States of Montana, North Dakota, South Dakota, Nebraska, and other States have a slight benefit, and the States of Iowa, Kansas, and Missouri have a slight detriment. More States win than lose on the regional allocation.

Does that basically conform to your——

Colonel SCHAUFELBERGER. Yes, sir, that basically conforms to the table. I found the table that the data came from. That conforms to the data that is displayed in here.

As I mentioned before, those may change slightly as a consequence of the data that we learned at the meeting; but based on the data that is depicted in this volume, that is correct.

Senator BAUCUS. I would like to follow up a little bit on the line of questions that Senator Conrad was asking. As you well know, the House of Representatives, unfortunately, in an appropriations bill, has language that there will be no change in the Master Manual that has a detrimental effect on navigation. That language is not in the Senate appropriations bill. It would seem to me that that language should be stricken from any appropriations bill because it would be a political directive to the Corps which would prevent the Corps from making a decision based upon the facts. Would you agree with that conclusion?

Colonel SCHAUFELBERGER. Well, it's language. It's not directive in nature. It's bothersome by having it there, but so far I have been given no direction to comply with the language that is contained in there. So unless someone gives me some additional direction, it's one of those things that are there that will not impact the completion of this study.

Senator BAUCUS. But would you agree that it is a political directive rather than an economic or factual directive?

Colonel SCHAUFELBERGER. Yes, sir, it is a political directive. That is correct.

Senator BAUCUS. And therefore it is inappropriate?

Colonel SCHAUFELBERGER. Sir, that's for you to judge. [Laughter.]

Senator BAUCUS. I can read between the lines. [Laughter.]

Senator CONRAD. That's a very good answer, Colonel. [Laughter.]

Senator BAUCUS. Mr. Sprynczynatyk from North Dakota made an interesting suggestion. He said, "Look, you've listed all these alternatives, but you don't give any priority to any of these alternatives." That causes a lot of us a little concern up here, upriver, that we have all of these alternatives—I think you have seven of them—but you don't give any priority to any of them. You don't name your preferred alternative, as is required under NEPA. Why not?

Colonel SCHAUFELBERGER. First of all, sir, we have not completed dialog and consultation with the U.S. Fish and Wildlife Service on what these mean to the three endangered species we are most interested in. One is the pallid sturgeon, and the other two are the interior least tern and the piping plover. Once we determine, in conjunction with them, what seems to be a reasonable balance as far as what needs to be done for the habitat requirements of those animals, then it is our intent to identify in the draft Environmental Impact Statement their views, and identify a preferred alternative.

Unfortunately, as I said earlier, I am not the decisionmaker here. I will make some form of recommendation, which may or may not be accepted. It is currently our intention to try to structure a preferred alternative to put in the draft Environmental Impact Statement which will be issued for public review in the March timeframe.

Senator CONRAD. March 12th is my birthday. [Laughter.]

Colonel SCHAUFELBERGER. So that is a very good day——

Senator BAUCUS. That depends on the conclusion.

Colonel SCHAUFELBERGER. I don't know that it will be March 12th, but our intention right now is to issue the draft Environmental Impact Statement in March, and then conduct four months' worth of public meetings throughout the basin to solicit public input. In order to make that public review meaningful, it is currently our intention to put in a preferred alternative.

Senator BAUCUS. That will be in the draft?

Colonel SCHAUFELBERGER. In the draft, yes, sir.

Senator BAUCUS. What criteria will you use?

Colonel SCHAUFELBERGER. As I indicated earlier, as we analyze all the data we have, the greatest discrimination among the alternatives lies in environmental output. So we must work with the Fish and Wildlife Service and with the Environmental Protection Agency—but principally the Fish and Wildlife Service—on compliance with the Endangered Species Act. Once we can find an alternative that meets the requirements for compliance with that act, then we would look to providing the greatest economic output.

There is a third factor that we have to look at, and that is the social impact. What is the impact of change on the people who live along this river? We have not completed that analysis. If the economics indicate that you really can't discriminate from one alternative to another very well, it may turn out that some social aspect might drive us to recommend a certain alternative versus another one, because when I look at economic output, the charge under our rules is to look at what is the economic impact to the Nation. But

there can be some regional impacts which have social impacts to people who live along the river that might drive us to make another recommendation. We have not completed that analysis to determine what that might be.

Senator BAUCUS. Would higher pool levels tend to give greater socioeconomic benefit than lower pool levels?

I will be kind to you. Let me quote your report. Your report states, your preliminary draft EIS on page 4–93, "Higher permanent pool levels thus represent high socioeconomic value to the first tier of counties and the Fort Peck Indian Reservation. Higher permanent pools should translate to more employment opportunities and a stronger local economy. An extreme drought under low permanent pools would bring about extreme stress under the current water control plan that would be measurably felt in the local economy, employment, status, fiscal well-being, and the quality of life. Raising the permanent pool would greatly reduce much stress."

Colonel SCHAUFELBERGER. Yes, sir. If the permanent pool was raised, then it would lessen the impact on the people who live around the headwaters of the reservoirs. They are the first who have the greatest impact. So clearly, people who live at the upstream end of the various reservoirs would receive a positive social and economic input from higher permanent pools. But then we must look at what the negative impacts are in other areas to ascertain what that all means when we put it all together.

Senator BAUCUS. I understand that, but you said in the draft that in the future you are also going to look into the third criteria, apparently a bit more than you have in the past. So we've already established that, all things being equal thus far, the upper basin States do better—in fact, the whole system does better—with the 44 million acre-feet; so when you factor in the socioeconomic, that would tend to indicate an even greater reason for a higher pool level.

Colonel SCHAUFELBERGER. From the perspective of the people who live in the upstream States, that is correct.

Senator BAUCUS. When you redo your preliminary draft and it becomes a draft EIS, are you also going to be making some other changes, namely, eliminating the bias that now exists in the preliminary draft toward navigation? One can't help but be struck with the tremendous bias toward navigation. Most references, most comments, most discussion seems to revolve around how it affects "navigation." First, I am quite distressed that there is that bias toward navigation in the discussion in the preliminary draft. Second, I just don't know why; you've already established that other uses are to be given equal weight. And third, you know the concern of other States. You know about the lawsuit that the upper States have filed. It was dismissed without prejudice, pending the Corps' agreement to come up with revisions that give current weight to all these criteria.

So will you in your draft—and hopefully in your final Environmental Impact Statement—delete or excise or purge all this unfair bias toward navigation? We're not asking you to delete references to navigation; we're just asking you to fairly ascertain and give weight and discussion to other criteria, as well.

Colonel SCHAUFELBERGER. Sir, we don't believe that we have biased the report toward navigation. In fact, if I had a different group of people in here from Missouri and Iowa, they would tell me it's skewed toward recreation. I hear that all the time.

I think that one of the things we have found is that when you make significant changes in the elevation of the permanent pool in being more conservative on how you release water, the purpose that takes the greatest impact is on navigation. But that does not mean that we consider it as a higher priority at all. We will go through the document to ensure that it represents a balanced approach, but our objective is not to skew the analysis in any way toward navigation or any other purpose.

Senator BAUCUS. Do you have any comment on that, Mr. Sprynczynatyk? Do you think it's skewed?

Mr. SPRYNCZYNATYK. Senator Baucus, it's our feeling that it is skewed because the current plan is obviously focusing on navigation and providing water to navigation based on estimates and projections that were made in the 1940's and 1950's that would have resulted in much greater navigation. It is our feeling that you shouldn't compare all of the alternatives against what the current plan is, because much of the release that is made during the summer months, obviously, is for navigation. If you consider the actual benefits that accrue to each of the different uses, navigation would fall by the wayside because it provides the least number of dollars in benefit of any of the uses.

So what disturbs us most is the fact that the current plan focuses on navigation. It was built at a time when the Corps said that navigation was the primary use of the system, and for all these years the system has been operated for the benefit of navigation. Now we are trying to compare other alternative operating plans against that plan which has navigation as a primary use.

Senator BAUCUS. That's a good point. In fact, I think that's a fair reading of your formal statement, Colonel, which would lead one to conclude that there is still almost an obsessive compulsion with navigation. When I read your statement yesterday, what struck me was all the references to navigation.

I would like to put one more chart up. It reinforces Mr. Sprynczynatyk's point, namely, the very low economic benefits of navigation. This chart shows—for those in the back of the room who can't read it, it is entitled "Existing Economic Benefits Within the Missouri River Basin." The blue on the left is hydropower; it's about 50 percent. The yellow over on the left is water supply; it's roughly 40 percent. Navigation is down at the bottom of the chart there, the bottom in value. It's kind of a yellow-orange color, and it's 1 percent. Recreation is up at the top and it's four times greater; it's 4 percent.

But the main point here is that navigation as an economic benefit is virtually nil. If you look at it on a percentage basis, you have the various categories of economic benefits within the system. The others are flood control, 3 percent; I already indicated hydropower and water supply.

Do you have any other questions, Senator?

Senator CONRAD. If I may, just to Mr. Sprynczynatyk.

My understanding is that the State of North Dakota has found that there may be a water quality issue that relates to the question of Master Manual review. Could you just briefly tell us what that finding is? Then I would like the Colonel to respond.

So please, give us the finding with respect to water quality.

Mr. SPRYNCZYNATYK. Senator, although I'm not the water quality expert in North Dakota—the State Department of Health is, and I've consulted with them on this—the concern they've expressed is that in North Dakota and Lake Sakakawea, a cold water fishery has been established over the years. The same is true in South Dakota, in Lake Oahe, which of course also extends into North Dakota.

What the State Department of Health has found is that the cold water fishery that exists in the reservoir is impacted when the reservoir levels drop below approximately—at Lake Sakakawea—elevation 1,830. The temperature rises, and what happens is that the cold water fishery is endangered because of potential disease, and also because of lack of habitat.

We are fortunate in North Dakota in that we have—at least, I believe this is still true—the only disease-free strain of salmon in the country. That's because we have been able to maintain higher reservoir levels in the past and maintain good habitat for the fishery.

I have entered into the record correspondence between Francis Schwint from the State Department of Health, and also Colonel Schaufelberger (see p. 82), that discusses this cold water fishery problem and the concern when the reservoir levels drop and the temperatures rise, and the impact on the salmon and trout that exist in the reservoir.

Senator CONRAD. Colonel Schaufelberger, you were indicating that environmental questions may weight the final recommendation here, may have a substantial impact. At least that's the way I took your comments.

Can you give us an initial assessment of whether high pool levels are better environmentally? Or do you have any initial conclusion with respect to that question?

Colonel SCHAUFELBERGER. Sir, for the benefit of the endangered species, the permanent pool level is not nearly as important as the timing of when you release water and that sort of thing. The endangered species, with respect to fish and those that are candidates for listing, are native fish which require warm water as opposed to cold water. That's why one of the environmental factors that we looked at is warm water habitat. But in order to accommodate the States that have established cold water fisheries, another factor we looked at is amount of suitable habitat for cold water fish, both in the reservoirs and in the rivers downstream. The cold water fish benefit from higher pool levels, but the warm water fish benefit from lower pool levels.

Therefore, that is the dichotomy that has to be worked with biologists.

Senator BAUCUS. I heard you say that the endangered species or those that are candidates depend more upon timing of releases than upon pool levels, is that correct?

Colonel SCHAUFELBERGER. With respect to physical habitat. But with respect to water temperature, they want warmer water. So what you will find is that as you raise the permanent pool, the temperature of the water you release downstream gets colder. That's kind of common sense. But from the perspective of the States, who are very, very interested in sport fisheries, they would prefer that; but from the side of the Fish and Wildlife Service, looking for native fish, they are looking for warm water habitat. So there is a dichotomy. Everything doesn't gain by having higher pool levels.

What we have to find out from the Fish and Wildlife Services is, what is the significance? How significant toward species A, B, or C—right today, it's the pallid sturgeon, but there's a whole menu of others that are so-called "candidate species"—how significant is that? From our evaluation of the data, it really doesn't make that much difference if you can provide something that looks like the natural regime of high flows in the spring, low flows in the summer, which benefit the native fish in their spawning in the rivers.

So it may be that we can find some middle ground where you do some improvement to the cold water species by raising the pool levels, but find out what we have to do in order to accommodate the environmental concerns if we want to release more water.

So the environmental alternatives that are displayed in there are more water users than are the national economic development alternatives, so we have to find some middle ground with the fish biologists.

Senator BAUCUS. Thank you.

Mr. Simonich, you've been sitting here patiently. I'll give you the opportunity to reflect on and summarize all of this. You've heard the Colonel and the GAO give their analyses of all this, as well as those from other States.

What would be the major messages the Colonel and the Corps should receive as they write the draft and move toward the final? I'm just curious about what you are thinking about after listening to all of this.

Mr. SIMONICH. Thank you, Senator. I appreciate that opportunity.

I think, as I said earlier, that the number one thing that Montana wants to see is that we have fair and equal consideration. That, of course, in Montana relates to the economic development possibilities in the State of Montana. There has been a lot of discussion about what those economic parameters may be. I guess I would offer that at $50 million or $67 million, whatever the figure is, for those three upper basin States, given the sparse population within those three States, the sparse economic base that we have in those States, that probably plays a much larger role in economics in our States than does, say, a $14 million impact in the lower basin States. I think it really should be given more than just a national weighting, but it should be weighted regionally to show that the recreational benefit is of extreme importance to Montana and to North and South Dakota.

Senator BAUCUS. That's an excellent point.

Mr. SIMONICH. That's number one.

I guess number two would be that when the Colonel has relayed the information and the figures that you showed, Senator Baucus, that show through various alternatives that the economic benefits are almost a wash, that is based on the data that the Corps has built into those runs that they have currently done. Montana has a significant concern about some of that data that has been used, particularly in relation to recreation. We believe the recreation dollar values are much higher than have been used in those runs, and we have asked the Corps—I believe at our issues review conference two weeks ago Colonel Schaufelberger indicated that they will take into consideration the recreational benefit values that we believe are adequate, and they are going to do some sensitivity analysis to those.

If you begin to use more accurate recreational values, then I believe you will begin to see that the benefit economically will begin to go up even more with higher pool levels.

The third point—you asked for three points—the third point that I would offer has to do with the environmental end of it. I believe Colonel Schaufelberger is correct, that the endangered species issue is really going to become a driving force in this debate. It's an issue that, up until now, has never really come into play with the operation of the dams on the Missouri River. But from our perspective, we don't believe we should have to trade off the reservoir fisheries to benefit the riverine fisheries. We believe there ought to be a way to accommodate both, to come up with a way of increasing the pool levels and operating the system so that you are reflecting a more natural run-of-the-river type of flow regime that will also benefit the riverline fisheries, the endangered species that are occupying the river areas.

Senator BAUCUS. All right, Mr. Sprynczynatyk and Mr. Roberts, you're going to wrap it up here.

Mr. SPRYNCZYNATYK. Senator Baucus, I don't know that I can add much to what Mr. Simonich said. We have argued for a long time that the system needs to be operated as fairly as possible for all of the people within the basin, and clearly I think there needs to be recognition of the regional economic impact as well as the national economic impact. You know full well what's happened in the upper basin States over the years and where we sit today from an economic development standpoint. What has happened on the reservoirs has been quite beneficial. I think there still is a tremendous amount of opportunity for development at the reservoirs within the three upper basin States, given that the reservoirs can be stabilized at a level that will be most beneficial to the recreation and tourism industry.

I think too, that as far as the environmental aspects go, we are all concerned about the environmental impacts up and down the river. I hope that the Corps does take the environmental concerns that have been expressed by all the States into consideration and select a preferred alternative that will be most beneficial for everyone.

Mr. ROBERTS. Mr. Chairman, I would just like to align myself with the comments that Mr. Simonich made about the regional economic impact being greater in the upper basin States because of population factors than it is in the lower basin States.

Second, I would express my concern again about the involvement of the Mississippi River in this issue. At the meeting that we had last week with Colonel Schaufelberger down in Omaha there was a representative there from Tennessee; he said that he was concerned that no one else from the Mississippi River Basin had shown up. I said that I was concerned that he had shown up. [Laughter.]

I understand fully Colonel Schaufelberger's responsibility under NEPA to consider the environmental impacts of what he is doing, but I submit to you, that is a different thing than considering the management of the river itself.

We appreciate the opportunity to make these points and solicit your continued support in this area that is so important to my State.

Senator BAUCUS. I appreciate that.

You have all been very constructive and very helpful. I think we have established, first, that recreation is to be given the same priority, at least; second, that the guidelines require the Corps to pick an alternative that has the greatest net economic benefits, and it is clear that the economic benefits of recreation are certainly higher than the economic benefits of navigation. There will be some consideration of the environmental effects of the various alternatives, which we will explore more fully in the future. But from the point of view of the economics of this, I think this hearing has nailed down more than adequately the priorities that the Corps should move toward in the revision of the Master Manual.

Before excusing this panel, does anyone want to say something in response to anything anyone else has said? Here's your opportunity.

Mr. DUFFUS. I would maybe just add a couple of points about the GAO report.

As both you, Senator Baucus, and Senator Conrad are aware, after this report was issued it was the subject of considerable controversy. We believe that the report did stand up to that controversy. It stood up to the challenge, and the assurances that the Corps has now put forth and the dismissal of the lawsuit—which in effect agreed that all purposes should be considered equally—is consistent with the thrust of our report.

The second point I would like to make is that we would hope that the Corps would change its policy for the management of all of its projects, because this categorization of projects as primary or secondary applies to all Corps projects. So we would be hopeful that the Corps would change that policy as it applies across the board.

Senator BAUCUS. I appreciate that.

Of course, it is not only Colonel Schaufelberger's decision, as he said. In many respects we should have his superiors here at this hearing to get on the record not only the Colonel's understanding of the facts and the law, but also the Colonel's superiors' understanding of the facts and the law.

I compliment you, Colonel. I think you have been straightforward. You haven't pulled your punches; you've been very direct. It seems like you are moving in the direction that we would all like you to move, that's what the facts indicate. That's the direction, according to the facts and the law, that we should be moving in. It's

up to all of us together to be sure that that happens, not only in Congress, but also in working with your superiors.

Thank you very much. I appreciate the time you've taken to come and testify.

[Applause.]

Senator BAUCUS. Our next panel includes Mr. Gene Reimche, County Commissioner of Valley County; Ms. Diane Brandt, Glasgow Chamber of Commerce up in Valley County; Don Pfau, Chairman of the Fort Peck Advisory Council from Lewistown; and Mr. Don Huffman, Vice President, Phoenix Towing Company.

We'd better get started; we don't have much time.

I spoke to Colonel Schaufelberger earlier. He has agreed to be available for any questions that might arise during the next two panels. We must conclude the hearing at very close to 12:00 o'clock, which means we have an hour and a half for the remaining two panels. Let's begin right away.

Mr. Reimche, why don't you proceed?

STATEMENT OF GENE C. REIMCHE, COUNTY COMMISSIONER, VALLEY COUNTY, GLASGOW, MT

Mr. REIMCHE. Thank you, Senator Baucus, Senator Conrad.

I am going to come from a little different angle on some of the items on the county, how the county works with the Corps, some of the things that affect us. I appreciate this opportunity to be here to testify today.

Three items I would like to touch on a little bit today are roads, breakwater, and lake level.

When I speak of roads I say that in Valley County we have worked in a joint effort with the Corps on road projects in the Fort Peck area. We are pleased to have completed most of the projects that we started. Three of them include a model paved road to the Duck Creek area, which the county did a joint venture on; the paved road to the Fort Peck marina; the boat ramp, which is the only paved access on the lake; and the parking lot and the shop areas.

I think that when we look down the road, these are going to be big attractions economically for Valley County, especially for the Governor's Cup and other activities. And Senators, I personally want to thank you for the part you played in raising the funding for this. The county would like to continue working on projects like this and extend them further.

The second item I would like to touch on a little bit is a thing that has been a big issue for a long time, and that's the Fort Peck breakwater. Fort Peck lake borders about six counties, with about 1,520 miles of shoreline at full pool. It is considered by some professional fishermen to be the premier walleye fishery in the U.S. Imagine the economic impact of properly managing a fishery of this magnitude. If water levels and releases were to be kept at an acceptable level to improve fish habitat, boat access, and increased fishable acreage, the Upper Missouri River Basin States could realize considerable growth.

I think when we look back, there were many stages in the development of this lake. For example, in the early 1970's a program for fisheries was formulated; wildlife management has been developed

and now plays a big part; and the building of the breakwater is needed to continue development.

Here are a few items that the breakwater would do. It would provide an adequate, safe harbor; it is a key element for development of tourism in eastern Montana; it will increase recreation benefits at the local, regional, and national levels; and it will increase interest in wildlife, fishing, and camping.

I think that at a time when the economy of eastern Montana is in need of a boost, this would be a great item. I think the hour has come when we should really look seriously at this for expansion and development, recreational facilities, and so forth.

I think we could probably summarize this breakwater thing by saying that we are all in the breakwater boat together; let's not let it sink.

One other thing that is important to the economy of the county and to this facility is the lake level. It is really difficult to gather the numbers pertaining to the impact of a low water level. Some of the examples have already been touched on, areas like Crooked Creek marina and the Duck Creek areas. This type of situation really puts the marina owner and the people in this business out of business. This is all reflected back on the county and the local levels.

I guess that in looking at it from a county standpoint, counties are capped by Initiative I–105, and the loss of revenue is really critical. I think the Corps needs to go on record showing that water levels at Fort Peck Lake are critical to recreation and economic opportunities. The Corps needs to define alternatives when there isn't an adequate water level, and so forth. The Corps needs to provide a plan for long-term strategies to protect water resources, especially in the upper basin States.

I think I would like to conclude on a personal note, that Fort Peck Lake isn't just another lake on the Missouri River system; it is a natural resource for Montana, a treasure to those of us in eastern Montana. It is unique and beautiful and worth fighting for, and let's keep fighting for it.

Thank you for this time.

Senator BAUCUS. Thank you very much, Gene.

Diane?

STATEMENT OF DIANE BRANDT, CHAMBER OF COMMERCE, GLASGOW, MT

Ms. BRANDT. I am Diane Brandt from Glasgow. I would like to address two areas regarding Fort Peck Lake: the economic effects of the drawdowns of the Missouri River on regional and area businesses, and the U.S. Army Corps of Engineers recreation management at Fort Peck Reservoir.

Tourism in Montana is increasingly being recognized as a tool with which to strengthen our economy. Estimated nonresident travel expenditures to Montana in 1992 were $900 million, bringing the total economic impact to over $2 billion. The number of visitors providing this impact is over 6.5 million and supports 32,000 jobs. These numbers are impressive, but most of those expenditures were in western Montana and the more heavily populated areas of the State.

Travel Montana's five-year strategic marketing plan has identified that more marketing and development needs to be done in the State's less-traveled areas.

All of this leads us to one conclusion: that eastern Montana, and specifically the Fort Peck Reservoir, is ripe for economic and recreational opportunities.

It is difficult for me to gather numbers pertaining to the impact of the low water levels at the reservoir, so I am going to share my personal experiences. The reason I got involved in the tourism business was that I could see the profits increase at my restaurant during the summer months. While I recognize the importance of our local customers, they are the ones responsible for paying the utility bills and making the payroll. It is the tourism dollars that provide revenue to survive during the slow, cold winter months.

Rural eastern Montana has suffered a significant loss of population during the last 10 years. Combined with the effects of the long drought, it's a wonder that so many businesses have survived. Unfortunately, too many people have left and too many businesses have closed, and the ones that remain can barely get by without the help of their local banker.

The persistent negative press about the low and inconsistent water levels at the reservoir has led the public to believe that there is no access to the water, that there is no water, and that there are no services to support the user. How can there be opportunities for new money or new growth in the community without the customer?

There can be no economic benefits from recreation in the upper basin States if there is no recreation management by the Corps. In dismissing the lawsuit filed by Montana, North Dakota and South Dakota against the Corps, U.S. District Judge Shanstrom said the Federal agency has agreed to the demand of the States that recreation needs in upstream reservoirs be given equal consideration with navigational needs of the downstream States. This, however, has not been the case. Since the lawsuit was dismissed last winter, the Corps has gone back to "business as usual." A Memorandum of Understanding among the Corps, BLM, and the Montana Department of Fish, Wildlife and Parks to install a potable water system at Hell Creek Recreation Area was lost in a pile of papers somewhere between Omaha and Washington, D.C. Monies budgeted for road facilities at Fort Peck's west marina were immediately reprioritized, making them unavailable for 1993. Through the efforts of Senator Baucus the money was reprioritized, and the project was recently completed.

The Fort Peck Master Plan was revised and approved in April of 1992. It provides infrastructure development, high and low visitation areas, recreation activities, wildlife conservation, and much more. The plan provides direction for project development and use. The Corps' National Policy on Water Management and Recreation Development continually makes it clear, by their actions, that they do not take management seriously.

As the Nation's second-largest provider of outdoor recreation, the Corps in Washington, D.C. needs to take responsibility for the overall management of the natural resources that they oversee.

I would like to point out that my community has a very positive and progressive relationship with our current Fort Peck Lake manager.

The Fort Peck Reservoir's recreationists, small businesses, local communities, and the States have suffered overwhelming economic losses because of no water or recreation management by the Corps over the past 50 years. The time for change has come. How can this be accomplished? I would offer this solution.

The people in charge of water and recreation management in the Corps office in Washington, D.C. need to be replaced. This new management team should be able to follow their own plan. They should have a vision for future development, yet an appreciation for the unspoiled natural environment. They should have an understanding of the local people and their love of the land. They need to realize that this beautiful land belongs to all of us. It is a natural resource—not only for Montana, but the entire country.

For any development, management, or opportunities to occur at Fort Peck Reservoir, we must work together cooperatively with common goals.

[Applause.]

Senator BAUCUS. Thank you, Diane. You have a lot of supporters there.

Don.

STATEMENT OF DON PFAU, CHAIRMAN, FORT PECK ADVISORY COUNCIL, LEWISTOWN, MT

Mr. PFAU. Senator Baucus, my name is Don Pfau. I represent the Fort Peck Advisory Council, which includes elected officials, recreationists, concessionaires, boat owners and cabin owners, as well as public agencies.

Our group has been working for over 20 years to develop Fort Peck Lake for the benefit of the people of central and eastern Montana. Our number one goal has been to stabilize the base water level at Fort Peck Lake within reasonable limits for needed fluctuations by the Corps of Engineers.

We need a variable level that will ensure that Fort Peck Lake is accessible at the west end of the lake, which includes U.L. Bend, Crooked Creek Recreation Area, and Fort Musselshell Marina.

The Corps of Engineers has failed to recognize the economic benefits that Montana could derive if Fort Peck water levels were maintained. Montana has not been able to achieve the true benefits of Fort Peck Lake because of the primitive conditions that the Corps of Engineers has let prevail since completion of the building of the dam.

Current statistics show that the recreation benefit on these upper river dams is almost $70 million annually, compared with only $14 million for barge traffic on the lower Missouri River, and the barge traffic continues to decline.

Looking at the Corps of Engineers' own statistics, they estimated transporting 12 million tons last year, and their peak was only a little over 3 million tons. Truly, does that amount of tonnage justify a nine-foot channel at a huge tax to the U.S. taxpayer, and lowering the water in these upper dams, which in turn has devastated our recreation industry?

We need the Corps of Engineers to write a new manual, and I emphasize the word "new." Montana and our sister States need to be treated more fairly and given more consideration. Our contribution to the amount of water in the Missouri River, which is almost three-fourths of the total water, should warrant fairness to our people above the political manipulations and political power that our lower sister States are unjustly imposing on us.

Thank you.

Senator BAUCUS. Thank you very much, Don. Your timing is impeccable. [Laughter.]

Now, Mr. Huffman.

First, I want to compliment you, Mr. Huffman, on your courage in coming here to take a contrary point of view. [Laughter.]

STATEMENT OF DON HUFFMAN, VICE PRESIDENT, PHOENIX TOWING CO.

Mr. HUFFMAN. Thank you, Senator. I am Don Huffman, and I am a navigator. I think I should be sitting with my back to the wall. [Laughter.]

Missouri River navigation has been severely tested as a result of the drought in the upper basin of the Missouri River. Season lengths have been reduced from eight and a half months in the 1980's to six and three-quarter months during 1989, 1990, 1991, and 1992. Our loaded drafts have been reduced from eight and a half feet to seven and a half feet. A rake barge loaded at Kansas City on the Missouri River will carry only 1,200 tons; that same barge, loaded to nine feet at St. Louis on the Mississippi River, will carry 1,500 tons. Absent higher freight rates, that barge will load at St. Louis, Missouri.

Tow sizes have had to be reduced from nine barges to six barges. The combination of the shortened season length, lighter drafts and smaller tows have reduced operating efficiency by 25 percent. These costs are either absorbed by the navigators, or, more likely, passed on to the shipping community in the form of higher freight rates.

During each of these drought years, Phoenix Towing has sustained substantial losses that threaten our ability to continue operations. The question I ask myself is, how long do we continue to do this?

As a result of these inefficiencies brought on by the drought, commercial tonnage on the Missouri River has fallen dramatically. During the late 1970's commercial tonnage on the Missouri River was well over 3 million tons annually. Corps records show that commercial tonnage falling to 1.2 to 1.5 million tons during the 1991 and 1992 navigation seasons.

Worse, in 1990 the upper basin States of Montana, North Dakota, and South Dakota sought an injunction against the Corps of Engineers to shut off flows for navigation. For a period of several days in May we did not know if we would have a navigation season, or if we would even have enough water to get barges off the river that were already loaded. On May 9th, the North Dakota judge ruled in favor of the upper basin States and direct the Corps to shut off releases for navigation. The Corps of Engineers appealed to the 8th Circuit Court at St. Paul, and the North Dakota

ruling was overruled. During this period one elevator in Brownville, Nebraska cropped its bid to the farmer by $0.15 a bushel, a clear indication of the effect of the loss of navigation on the farm community. During this season, logistics were difficult and Missouri River navigation was in jeopardy.

Missouri River water is important to more than just Missouri River navigators. According to a study by the University of Missouri, should navigation in the Missouri River cease, it would cost Missouri agriculture $100 million annually in the form of increased input costs, basically fertilizer, and in reduced prices received for their products. This study clearly shows the effect of water-compelled rates on Missouri agriculture.

I might add, this number only includes Missouri. They did not study the States of Nebraska, Kansas, and Iowa.

According to a study by Temple, Barker & Sloan, the suspension of Missouri River navigation would increase the cost of transportation for farm commodities by $6 a ton or more. This equates to a reduction in the price paid to the farmer of approximately $0.18 to $0.20 per bushel. It also should be noted that rail capacity is not adequate to move crops in the lower Missouri River basin during the summer wheat harvest, nor during the fall harvest.

The availability of barge freight and the pricing of barge freight has a direct effect on the price the Missouri farmer receives for his crops.

Reduced business on the Missouri River has resulted in a loss of river-related jobs. The number of boats operating on the river has been reduced by as many as six. At 15 jobs per boat, that loss is 90 jobs. Using a factor of 3 support jobs lost for every river job lost, this becomes 270 jobs.

Also, under normal flow conditions during the summer months, the Missouri River provides more than 50 percent of the water flowing past St. Louis. During the drought months of 1988, the Missouri River delivered 65 percent of the water flowing past St. Louis. Without Missouri River flows, the Mississippi River would have been closed.

Any disruption in Middle Mississippi River navigation will have negative impacts on shipments from ports in Illinois, Wisconsin, Minnesota, Missouri, and Iowa. Additionally, the receiving ports in Tennessee, Kentucky, and Louisiana will be negatively impacted.

Colonel Schaufelberger stated that the downstream interests feel that the Master Manual review favors the upper basin States. As a matter of fact, that is correct, in our opinion. I had a conversation with the Colonel as recently as Thursday, complaining about releases. We don't believe that the review considers water-compelled rates, nor does it consider the value of Missouri River water to Mississippi River navigation.

I would like to thank Senator Baucus for the opportunity to participate in this hearing.

Senator BAUCUS. Thank you very much, Mr. Huffman.

On that last point, you heard GAO and the Colonel himself state that in the law there is no legal authority for the Corps to manage the Missouri River for the economic benefit of the Mississippi unless there is a Presidential emergency. Do you agree with that conclusion?

Mr. HUFFMAN. Well, Senator, I'm not a lawyer, and I certainly don't know the law the way the Colonel does, so I won't dispute what the Colonel said about the law.

Senator BAUCUS. Therefore there is no legal authority for the Corps to manage the Missouri for the benefit of the Mississippi, except for Presidential declarations of emergency.

Mr. HUFFMAN. Senator, my point is that 100 million tons of cargo move past St. Louis, and it's a very important transportation link for the upper midwestern farmer. I suspect that if that transportation link is threatened, that there will be a very strong outcry from those farmers in those States.

Senator BAUCUS. So the recourse—if there should be a recourse—would be a change in the law, because the law is presently clear on this point. That is, in our form of Government, we're supposed to follow the law. If the country believes that the consequences are inappropriate, the proper remedy is to try to change the law.

Mr. HUFFMAN. Perhaps that's the answer, Senator.

Senator BAUCUS. But you agree that the law today is clear, that the Corps has no legal authority to manage for the benefit of the Mississippi?

Mr. HUFFMAN. I'll just go with the Colonel's testimony.

Senator BAUCUS. Okay. Thank you.

A couple of other points. Do you also agree that the law today basically provides that recreation is to be given at least equal benefit, accorded equal weight, compared with navigation? The GAO said that, and the Colonel agreed that that is the law today. I'm just curious if you agree that that is the law.

Mr. HUFFMAN. Well, I heard the Colonel say that that was the current position of the Corps of Engineers, that they had changed their position from the 1980's, if I have the date correct.

Senator BAUCUS. They have changed the emphasis; they had two categories that they've changed. But the GAO and the Colonel stated—we can ask the Colonel to restate his position, but I heard the Colonel to say that he agreed that under the law, recreation must be given at least equal weight, compared to navigation.

Mr. HUFFMAN. Yes, I heard him say that.

Senator BAUCUS. Do you think that is the law?

Mr. HUFFMAN. Senator, I'm not nearly as up to date on the legalities of the Master Manual and the Pick–Sloan plan as the Colonel is, so I won't argue with the Colonel on that subject.

Senator BAUCUS. I don't mean to be argumentative, but if you don't argue with him, you agree with him?

Mr. HUFFMAN. On that respect.

Senator BAUCUS. Okay, thank you very much.

I would like to ask Mr. Pfau and Gene and Diane to comment on the dollar expenditures that the Corps has made to date upstream versus downstream. Could you give us a clearer picture of the relative—I don't want to lead you too much—disproportionate emphasis that the Corps has given in recreation expenditures, marinas and breakwaters and so forth, upstream versus downstream?

Mr. PFAU. Unfortunately, when Fort Peck was built, there was nothing built into it whatsoever, no recreation of any type built into the program at all. The minimum amount at Fort Peck itself, at the dam, was about all that was there. The rest of it developed

pretty much from areas of access that you could get into. A lot of us have traveled that thing. It's still in a primitive stage today. We don't have adequate roads in there; we don't have recreation areas; we don't have a breakwater at Fort Peck; we don't have designation markers to identify where you are on the lake.

I challenge anyone to travel any of these other areas where the Government has come in and developed these dams—the gentleman from Tennessee, if you go back to his areas, you will see wonderful boat landings, swimming pools, you name it. It's all there, first class, deluxe, and this is true on a great many of the mainstem dams that the United States Government has developed. Why Montana has been left at the very end of this type of thing—you people know the economic development here in eastern and central Montana—we have watched our people leave the area. Here is a real opportunity for us to have something that would bring people in. With just Bill Harris' development there at Crooked Creek in 1988, his recordbook showed thousands of people coming into this area without it even being pre-advertised that much. It's just the touch. If we could get it all going, it would be so much better for us to increase our tax base and give these people a fair shot.

Somewhere in this thing—it looks like between the Corps and these people here, our neighbors from down south—there should be some kind of balance on this lake level, that you could leave the water in there somewhere between the first of May or the end of May through the first of November, and then work with them to try to work that out so that they could have some of that water to go down and run their barges. But somebody has to start talking to each other to try to work things out like this.

The big concern that our committee has on this thing is that 19 States, 19 Senators, very strong people, very strong States, high population levels, write to the President of the United States, and that's his guidance in making sure that these people and their barge traffic are protected. That's well and good, but we're here with three States, a limited amount of political—we have political clout with these people in these key positions, but we worry that we have enough votes and enough power to take and hold this thing together where we really get treated fairly. We question and we wonder that that can happen.

Senator BAUCUS. Thank you, Don.

Diane or Gene, if you could just comment generally on the expenditures on development of recreational facilities in our State and the North Dakota as compared with downstream.

Ms. BRANDT. Well, I am a cabin owner at Fort Peck Lake, so I spend quite a lot of time out there. I would just give this example. Two years ago down at Kiwanis Park, which is the largest public campground in eastern Montana, in one area of that park my young son couldn't make it across the park to get to the bathroom, so I requested from the Corps manager some toilets. About a year later I did get my two Port-a-Potties. I do have two Port-a–Potties down at Kiwanis Park, but you shouldn't have to wait a year to have a facility that is accessible to the public. It's a beautiful campground down there.

But the problem with the way that the Corps manages Fort Peck Reservoir is that it's a piecemeal thing. It's a little here and a little

there. The road project—it's ridiculous that you should have a road project prioritized. That road should have been paved 20 years ago. It's irresponsible, the way that it's managed, and the people in the marina—they just bought this from South Dakota a year ago—how can they plan or expand or have inventory because of the erratic management down there? It is impossible to get to the boat ramps when the rains are bad. How are you going to get people to come out here with a nice big, expensive boat if you can't get it into the water? Or if you do get it into the water, you're going to scrape up the bottom of it.

I have to tell you another thing that really hasn't come into this as far as recreation is concerned, and that's the safety of the people. As those water levels go up and down you have huge islands and trees. I can do it well myself because I do it all the time, but it's very dangerous as those water levels go up and down, when you're out there with your family in a boat, ripping around. It's a huge body of water; there is lots of room to go out there, but it's very dangerous if you don't know that water.

Another thing I really want to point out is that the people who probably wrote the letter to the President, the Congressmen from the lower basin States, concerning this issue, are probably the people who are going to be telling us how we should manage it and how much land should be available for recreation. They are the people who will probably come here and ultimately use this property. I mean, there are so many recreational and natural resources available out there, and I think that the whole concern of us who are involved is that it is properly developed, with consideration for the land. It's a very major concern for us, that it's done properly. The way that it's managed right now, I just don't think that's going to happen.

Senator BAUCUS. That raises another point. You touched on it, Don. When the Corps tried to determine recreational economic benefits, I understand that they just surveyed larger marinas, to try to inventory who was there; they paid no attention to who was out fishing, no attention to lots of other people who don't use the marinas themselves directly. And also I'm sure it did not deal with Bill Harris' survey down there.

Could you just comment—if the Corps were to truly try to determine economic benefits, could you give them a little guidance as to where they should go, what data they should use, whom they should talk to and so forth, to try to get an accurate sense of this?

Mr. PFAU. I think a prime example of that is that we worked with the Corps of Engineers through the 1980's to try to develop this recreation area down at Crooked Creek. They sent in quite a few people to work with us, and they were good people working with us. They put in these other recreation areas down there.

Well, the first thing was to get this land. So we finally went through all the paperwork, with Petroleum County being the principal, to take all this. This has taken three or four years to put this all together, and this man is planning on something here. They finally agree; he puts it in, he goes out there, he puts—and this is after the Corps has approved it; the Corps of Engineers said, "We want a recreation area," approved it, everything with the county, with him. He puts in $100,000 out there, has a beautiful setup, a

great place to camp and fish and swim, the whole thing, all by his own works. The Corps put in the boat ramps and toilet facilities and a few minor base paths and Bill Harris put in everything else, including a landing strip. There is a huge, two-story log building there now as a lodge, and it's a big development.

Now you go down and look at it, and the water is a mile and a half off from that dock. You can't even get close to it. This man and his family are trying to make a living by doing this under the auspices and agreement with the Corps of Engineers to come in and let him do this, and then they let that happen to him? At that period of time, that logbook—and I've seen it—I told him that's the key to it, and that's the thing that the Corps needs to look at, is to look at those statistics on those people who go down there. Those statistics were there.

It's just barely been touched. The surveys that the Corps did—we were quite disappointed when they sent the people in to start with. The committee and I thought that they sent them in pretty much in cold weather, and their analysis of being able to get around and to actually look at the area and talk to the people was very limited and it was a very poor time of the year to actually go in and evaluate what the recreation and development at that time would be on that lake. I'm not saying that they weren't dedicated people. They tried, but we just didn't think it was well done. Also, like any Government project, it took an awful long time before we finally got the final deal. It looks pretty good after you get to the finals on it, but it's all on paper. It's all paper stuff. Unless you have the money to back up the paper, none of this stuff happens. It remains in that primitive condition.

Senator BAUCUS. We're really making two points. Number one, the surveys and the data were inadequate, if they were adequate and accurate, the chart showing that recreational economic benefits are $67 million, would be much higher.

Mr. PFAU. That's correct.

Senator BAUCUS. The second point you're making is that if we had the same amount of dollars spent or attention paid to development of marinas and breakwaters for example, that would add even more economic benefit to the region because then more people would have more facilities to use. It would be a greater draw and more people would come and use it.

Mr. PFAU. It would add a tremendous amount to the tax base of these counties that are hurting and need a little improved tax base.

Senator BAUCUS. So in a real sense, the determined $67 million economic benefits are understated; that is, that not only are they not close to their potential, they are inaccurate.

Mr. PFAU. It's very much understated.

Ms. BRANDT. Because we've never been given an opportunity to make that number go up. It's like we've been held back and tied down. The people in the local communities surrounding that lake are ready to go. The Fort Peck Advisory Council—we have the master plan. The framework is there, but the opportunity, because of the management—we've not been given that opportunity. I think that is where a lot of the frustration comes in. There are people who will move there, who will open businesses, who will outfit, who will have bait and tackle stores. There are all kinds of opportuni-

ties, but we haven't been given that opportunity because we've been restricted.

I did want to add one more thing on the economic numbers. Montana has a Tourism Institute and Tourism and Recreation Research at the University of Montana. They are currently doing an updated study of the economic impact on Montana. Well, Montana has six tourism regions; I talked to this economist last week, and hopefully by the spring that would be broken down into the State's six tourism regions. Our tourism region on the lake is eight counties.

So I think that we would probably have some pretty good numbers by the spring that we could use to go with that.

Senator BAUCUS. Thank you very much.

I was really struck with the point that you made earlier, Gene, that there was a lot of publicity about Crooked Creek and the mile and a half distance. A lot of people know about that; unfortunately, it gives the impression that the facilities aren't there or that it's hard to get access to the lake, and that discourages people from even trying.

Mr. REIMCHE. One more thing, Senator, that I would like to add. Don and Diane have covered most everything. Being a Commissioner, I'm always sitting here, listening to problems.

Anyway, we try to work with the Corps all we can on roads. It puts a burden on the county. We do everything we can. We get a lot of requests, lot of complaints and stuff like that. This last venture that we did with the Corps, the county put in about $141,000 into the project out there, our portion of it.

Another thing that Diane touched on a little bit was the—I'm going to call them "marker lights." The Coast Guard has contacted the counties and they want the counties to take over these marker lights. They want to update them to a solar system, and they want the counties to be responsible for them. I feel it's the Coast Guard's responsibility as far as the marker lights are concerned.

I also feel—and Don touched on it—that if we can have an established lake level, we're going to get more tourism, we're going to get more people interested in developing out there, and the more tax base we're going to have. It's been real positive. Diane probably knows the numbers better than I do. We've had a number of outside people invest in the marina and the Lakeridge Motel and the hotel and the cafe downtown. This is positive interest, and this is all outside people.

So I think that the number one thing is common sense. It boils down to just using good common sense as far as that lake level and the management are concerned.

I want to thank the Colonel, too. I need help, frankly, to get that Fort Peck road paved. We'll give credit where credit is due; I want to thank you, Colonel, for your help.

Colonel SCHAUFELBERGER. Thank you.

Mr. PFAU. We need to thank him, too, for that Hell Creek agreement.

Senator BAUCUS. That's right. We're getting that agreement put together.

Senator Conrad?

Senator CONRAD. Just to conclude with this panel, Mr. Chairman, I would just like to reassure Mr. Huffman that we're not talking about eliminating navigation; we're not talking about that, and we're not talking about some kind of unfair result here.

I think if you had an opportunity to live here and to have experienced what we have experienced, there have been some things done that would rattle your eye-teeth, too. I can tell you, to be in the midst of the worst drought since the 1930's and to find out that the releases from the reservoir are the largest in 89 years, that really angers people. To see the Corps conduct a big flush and have very high releases—for what purpose, I've never understood—in the midst of the worst drought since the 1930's, that didn't help you, it didn't help us, it didn't help anybody.

These are things that cause enormous anxiety. I think if you could have sat with the young couple who invested all of their life savings in a marina in North Dakota, and day after day see that lake recede from them until it was over a mile and a half away from them, and see their life savings dribble out just like the lake dribbled out—there has been very serious impact here, and that's why you see a high level of concern.

But I think there is also a sensitivity to your situation. We don't want to see an outcome that neglects your needs or pays no attention to them. We do want to see, and we are going to insist on, some kind of fair weighting of the benefits and the responsibilities. We hope that in that, ultimately, all interests will be served in an equitable way.

Mr. HUFFMAN. Mr. Conrad, none of us caused the drought. It's been very difficult for all of us. I've seen pictures and heard stories of the problems the marina operators had.

We in navigation on the Missouri River have suffered during this drought. You say you don't want to harm navigation, but navigation has been harmed. Our industry has shrunk by 50 percent during the drought.

If the reservoirs are managed as you wish, there will be no navigation on the Missouri River. I think it's important that I say that, that we not leave here with the idea that somehow these lakes can be maintained at 44 million acre-feet or some other number, other than 18 million acre-feet. We already have gotten to a point where we're barely holding on. So any change in reservoir levels will, in fact, put me totally out of business.

Senator CONRAD. Well, let me just say that I don't see the evidence to support that, very frankly. We had a much healthier reservoir level before this drought; we have much healthier levels now, and you weren't out of business then. I don't accept the notion that for there to be fair reservoir levels here—and I have not reached a conclusion that it has to be 44 million acre-feet; I have not reached that conclusion—but evidence would indicate that that may be a net benefit to the national Government with respect to economics that is preferable. But I frankly believe that if what you're saying is that for us to get fair treatment means no navigation, I don't think the facts support that conclusion.

Mr. HUFFMAN. I think if we could have someone from the Corps respond. If it was 44 million acre-feet, in several of the past 10 years there would have been no navigation. Once the navigation

leaves the river, then the shippers will be forced to contract with the railroads, usually with three- or five-year contracts, to move their products.

So now we have a system that is totally gone——

Senator BAUCUS. If I can interrupt at that point, Mr. Huffman. I can't understand that, because in your testimony you said that there is inadequate alternative service for farmers—rail service, for example—to ship agricultural products. If that's the case——

Mr. HUFFMAN. It is the case.

Senator BAUCUS [continuing]. Then how are farmers going to get their products to market?

Mr. HUFFMAN. Sir, what will happen is that there will be times during harvest when farmers won't get their crops to market. The large corporations that can contract with the railroads for a three-year contract for big volume, those corporations will contract with the railroads, the point being that that will preclude navigation from coming back on the river. Business thrives when you have a consistent system. If you take navigation away from the Missouri River for one or two or three seasons, and a shipper looks at that, given a projection of that navigation being gone, he's not going to build facilities on the river to ship by barge.

So, Mr. Conrad, I would very strongly disagree with your premise, and I invite you to come to St. Louis and hear what the shippers have to say regarding the Master Manual review and regarding higher lake levels. It would be nice if we could have higher lake levels and navigation, but, sir, we cannot.

Senator CONRAD. Again, I reject that based on the evidence I've seen. I don't think that is the case at all. For years we had much higher lake levels and you had navigation. You just had the worst drought since the 1930's. Obviously, that is an extreme situation. Already we have seen remarkable recovery in the reservoirs, and the notion that for us to be given fair treatment—and I do not conclude that 44 million acre-feet is the magic number; I have not reached that conclusion—I would say to you that there needs to be balancing. I think all of us recognize that there has to be fairness, but we've reached the conclusion that we certainly were not treated fairly during the depths of the drought, and, in fact, the Corps of Engineers has now acknowledged that the law which they were using to justify treating navigation in a superior way to recreation simply is not supported by the statutes.

I think there can be a balancing of interests here, but I also think it is very clear that recreation has an equivalent treatment to navigation. If you're telling us that navigation, which is 1 percent of the value, has to be treated specially, that I reject. That is not what the law provides; that's not fair; and we will fight that a long, long time, if that's what your assertion is, that navigation should be the tail wagging the dog here. I mean, if that's the argument that you're making, that argument is not going to be very successful in this part of the country.

Mr. HUFFMAN. Senator, I guess we agree on one thing, that we felt that the Corps was biased toward the upper basin States during the drought. We did have a Master Manual, and water was not released according to that manual; the water was held in the upper basin. So at least we can agree on that.

Senator CONRAD. I can tell you, if you had visited our lake levels, you would see that water was released, because the lake levels here plunged. There's no question that it was being released. In fact, during that very period, as I indicated earlier—at my previous hearing four years ago we found out that we had the highest releases in eight or nine years during the very period that we had the deepest drought.

So the assertion that they weren't releasing water here, are not supported by the facts.

Senator BAUCUS. Gene?

Mr. REIMCHE. I have a question for Mr. Huffman.

In the last 10 years, what has been the increase in the size of your barges? I'm a farmer-rancher also, and I know we have to move our commodity, but I'm sure there's been some increase in the size of the barges so that they require more water to float them.

Mr. HUFFMAN. No, sir, our barges are basically the same size. They are a 12-foot hull. They can be loaded up to 10 feet. On the Missouri River we can't do that, but at St. Louis there are times when barges are loaded to 10 feet. The barge size is basically the same. It hasn't changed much.

Senator BAUCUS. I would like to explore one point a little bit, Mr. Huffman. You said that if the pools were managed at 44 million acre-feet, with drought, that would be the end of the navigation barge business. That's basically what you said, is that correct?

Mr. HUFFMAN. That's correct.

Senator BAUCUS. Let me ask Colonel Schaufelberger if he can comment on that; that is, according to the Corps' best estimate, if the pools were managed at 44 million acre-feet, Colonel, what effect would, say, a one-year drought or a three-year drought or a four-year drought or a ten-year drought have, in your judgment on the barge business and on navigation on the lower Missouri?

Colonel SCHAUFELBERGER. Sir, it would depend upon how severe the drought is. As I indicated in the questioning earlier, as a part of our study we looked across the 93 years of record and we looked at the 21 years from 1930 to 1950. Had we operated in that 21-year period between 1930 and 1950 with a 44 million acre-feet pool, there are 10 years in which there would be no navigation support because there is no water.

So whether or not navigation can survive when in 50 percent of the year there is no water, I leave that to the navigators to decide. But it really is the function of how severe the drought is and how you balance the impacts. That was the worst period in the record; now, we never operated that way, because we didn't start operations until 1967. But had that been repeated—there is a table in the draft EIS that shows you that.

Senator BAUCUS. I'm looking for it.

Colonel SCHAUFELBERGER. I could find it for you.

Senator BAUCUS. As I recall that portion in the draft, the chances of that severe a drought occurring in the future are quite remote.

Colonel SCHAUFELBERGER. That is quite correct. But what we try to do is look at the worst situation because, as I mentioned in the questioning before, what we're trying to do is figure out how to adjust the impacts to the various purposes when we don't have

enough water. When there's plenty of water, unless you have a repeat of 1993, you sort of accommodate everything. But if you were to repeat that exact 21-year period and you operated such that you did not allow the pools to go below 44 million acre-feet, then you would have 10 years in which there would be no navigation support.

See, the current Master Manual that exists today was prepared based on the premise that if you had a repeat of the 1930's drought, you would not run out of water, and that's why the rules are set to go down to 18 million acre-feet. What we did was tweak a little bit and we said we'd be more conservative, so you would get a better payback, and you never had any years where there was no navigation. But if you constrain the amount of water that is available for release, clearly there is going to be an impact on downstream activity.

Senator CONRAD. What did you go to in terms of preventing years when there was no navigation?

Colonel SCHAUFELBERGER. Sir, we tried to mitigate that by being more conservative earlier in the drought.

Senator CONRAD. That's what I'm asking——

Colonel SCHAUFELBERGER. There's a decision table in there. We used a much more conservative decision table than we use today, but still, when you hold that much water, you still lose to evaporation. There was just not enough water provided to do all the purposes.

Senator CONRAD. And what are the odds of that weather pattern being repeated? What kind of probability did you put on it?

Colonel SCHAUFELBERGER. I don't know. I could find out for you. I don't know what the probability of that occurring was, but we tried to use that—that's the worst we know of in the period of record, so the impact if that was repeated. Hopefully, we never have to live to see it repeated.

Senator CONRAD. We hope not. We've just been through a brutal experience. We don't want to go back and repeat the 1930's experience.

Senator BAUCUS. Thank you all very much. I have to conclude this panel because we don't have much time left for our remaining panel. Thank you all for coming.

[Applause.]

Senator BAUCUS. Our third panel, the wrap-up panel, includes Mr. Bill Harris, who owns the famous Crooked Creek Marina; John Lamb, Executive Director of Montana Walleyes Unlimited; Daryl Wright, Executive Director of the Mni-Sose Indian Coalition Group from Rapid City; and Chairman Jesse Taken Alive with the Standing Rock Sioux Tribe, Fort Yates, North Dakota.

Bill, why don't you go ahead?

STATEMENT OF BILL HARRIS, OWNER, CROOKED CREEK MARINA, WINNETT, MT

Mr. HARRIS. Senator Baucus, Senator Conrad, my name is Bill Harris. I operate the Fort Musselshell Marina where the Musselshell River and Crooked Creek join the Missouri River at the west end of Fort Peck Lake.

For nearly 25 years the water level in Fort Peck Lake fluctuated up and down within manageable bounds to offer access for greater water recreation. Though our area was remote and inaccessible, people from all around struggled with much expense and risk to reach their destination to use this wonderful water resource. Then in 1987 a new road was completed and graveled that would allow access to the lake with ease and safety. Finally, after years of struggling working, hoping, praying and never quitting, 50 miles of rural road and trail was turned into an all-weather gravel road. This was all made possible by the relentless effort of the people who wanted to use the area, but also by an unprecedented effort by many Government entities working unselfishly together for the common good of the obvious need. These Government entities include the Bureau of Land Management; the United States Fish and Wildlife Service; the Montana Fish, Wildlife and Parks; our own county government; and yes, even the Army Corps of Engineers. All of these entities and agencies recognized unanimously the need for good access to a much-desired area for recreation.

In 1985, looking forward to the expected improvement of access and knowing the recreation potential of the area, I approached the Corps through the cooperation of Petroleum County to open a concession business to meet the needs of the growing number of users at Crooked Creek. I was met with enthusiasm and encouragement by the Corps. By the spring of 1987, a lease agreement had been worked out and signed. During 1987 and into 1988 I hired equipment to do landscaping and graveling; I built a log building to be used as a store; I laid out a campground area; I constructed a dry storage area for boats, etc.; I put in a fueling system for vehicles and boats; I built a set of boat docks; I bought some adjoining private property, built a landing strip, built an access road to it, laid out a design, and subdivided for the purpose of making available cottage and cabin sites. I even hired an engineer to draw up a long-term construction plan for the marina lease itself. This was required by and approved by the Corps. All of these things were done entirely at my expense and approved by the Corps.

The people that I have worked with have been very capable, very cooperative, and very encouraging. But no one ever said that they might take the water away. I heard about in-depth studies of siltation rates and saw historic graphs of previous water levels which set a precedent of constant available water levels, and no one ever said they might take the water away.

I do not believe, however, that the Corps of Engineers—or individuals within the Corps—purposely set this devastating financial trap and disrupted the fast-increasing use of this recreation area because, without exception, these people have been caring, helpful and capable professionals. But I firmly believe they didn't know that another arm of the Corps of Engineers would, without any consideration for the needs and commitments of all of us involved, indiscriminately take the water away.

I believe the opportunity is at hand to right this wrong. The Corps of Engineers has the chance now, by including in the new Master Manual, a minimum drawdown level that will ensure recreational capability on Fort Peck Lake and encourage growth and investment on and around the lake.

Thank you.
Senator BAUCUS. Thank you very much, Bill.
John?

STATEMENT OF JOHN LAMB, EXECUTIVE DIRECTOR, WALLEYES UNLIMITED OF MONTANA, GLASGOW, MT

Mr. LAMB. My name is John Lamb. Thank you, Senator Baucus, Senator Conrad, for this opportunity to speak to you. I am the Executive Director of Walleyes Unlimited of Montana; I represent 1,600 members in Montana as well as 2,000 people who have subscriptions to our quarterly magazine, Fitzgerald's Magazine.

I want to talk specifically about the walleye fishery on Fort Peck Reservoir and how the drawdowns affect that walleye fishery. I am not a biologist; however, I do know that at a certain elevation, natural reproduction in the lake can occur. In the last preceding five years, natural reproduction has been nil, so that means that the only real fish reproduction as far as walleyes that's taking place is what's being done by Montana Fish and Wildlife and Parks. That's a hit-and-miss proposition; it depends on how well the hatchery does at Miles City, which we only have one of. It depends on whether or not the weather is conducive to them putting the fish in in the first place. It's an "iffy" proposition. The walleye fishery has probably suffered up and down as a result of that. So there is a minimum level on the reservoir that will maintain the walleye fishery.

There is another issue to Walleyes Unlimited in itself, as well. We sanction five walleye tournaments in Montana; three of those tournaments are held on Fort Peck Reservoir. They are unique in that our tournaments feature a "catch and release" format. It is a catch and release format that is accessible; we don't take fish out of the reservoir and kill them, we put them back. We feel like we're stewards in that regard.

The reason that I bring that up, though, is that our problem has been in access. Yes, there are supposedly 18 sites at which you can reach Fort Peck Reservoir, and if you have a 4-wheel drive that has four chains and you pay very close attention to the weather maps, you might be able to pull it off. But that's about the only way that you can do it. The fact is that some of the primary locations that are on the lake—Crooked Creek, Hell Creek, Rock Creek, Fort Peck, and the Pines area—are basically inaccessible due to weather most of the time. There is only one concrete or asphalt location on the lake now, and as Senator Baucus points out, that's the one at Fort Peck Marina.

I'm not going to talk about the specifics of the earlier testimony, but what I do want to say is that we heard that there is this trade-off occurring, that if we don't have water being used for navigation downstream, that those people are going to suffer, and I can see that they will. The problem is that us people in Montana, North Dakota, and South Dakota are paying the cost of that subsidy up here every single day. The fact is that none of the money and none of the benefits of them having that barge traffic available downstream comes to us. Now, maybe if everybody was paying the true cost involved here, maybe we would see hard-surfaced access sites to all of our places on Fort Peck Reservoir. That's not the case.

Maybe if we saw some of the money that should be coming back to benefit us from the effects of the drawdowns, we would see all-weather boat locations where you could put a boat in regardless of the level of the lake. We're not seeing that.

The problem is that we're basically the ugly duck here, of the six reservoirs. Maybe someday we'll grow up to be a swan; maybe we won't. The problem is that there is essentially no money and no resources being directed toward filling those needs in this particular area.

The argument is a "chicken and egg" argument. They argue that, well, there aren't enough people up there in Montana for us to spend those kinds of dollars in developing that kind of access. Well, the fact is, unless we have that kind of access, we're never going to have anybody here because they already realize that they can't get to Crooked Creek not only because there isn't any water, but there are probably no all-weather facilities for them to get there in the first place. That's the problem that we have here.

I've read through the documents that were provided by the Corps, and what I'm struck with is what Senator Baucus was struck with. The fact is that there is a bias contained in all of that. It's not only in the management of the level of the water, but it's also reflected in their management of the area itself. The fact is that they argue on one side that they have to spend an awful lot of money maintaining the leased cottage sites on the lake itself; they say that costs a lot of money, and that the reason they have to do it is because the Federal Fish and Wildlife Service says they need to do it. The fact is that's an excuse, not a reason. They could sell those lots to the people who currently lease them. They could get out of that business. They're not in that business on other reservoirs and they don't need to be in that business on this one. They can take and spend that money to develop some premier sites—not 18 sites; what we need them to do is give us six locations where you can arrive at the lake at any point in time, and people will come here and they will use the reservoir.

Thank you.

Senator BAUCUS. Thank you very much, John. That's very good. We appreciate it.

Daryl, go ahead.

STATEMENT OF DARYL WRIGHT, EXECUTIVE DIRECTOR, MNI-SOSE INTERTRIBAL WATER RIGHTS COALITION, RAPID CITY, SD

Mr. WRIGHT. Thank you, Senator.

Mr. Chairman, my name is Daryl Wright, and I am the Executive Director of the Mni-Sose Intertribal Water Rights Coalition. On behalf of my board of directors I would like to thank you and Senator Conrad for the opportunity to testify on the Master Manual process.

Mr. Chairman, our people believe that water is a gift of life from the Creator and represents the lifeblood of our people and the earth, our mother. We are taught that the treatment of this gift must not be taken lightly and that we must always protect it so that it can nourish our future generations. It is with great difficulty and regret that I stand here today, addressing water as if

it had no life of its own, and that in order for me to protect the Creator's gift, I must present our concerns based on policy and law and not as the gift that it truly is.

While the tribes take their role as trustees of the Creator's gift as seriously as life itself, the Federal Government has a longstanding history of failing in its trust responsibility to the tribes. With regard to the Master Manual review process, a prime example of the continuing failure by our trustee to protect our resources is reflected in a letter from the Office of the Secretary of Interior dated July 14, 1993, signed by Jonathan Daeson and directed to the Acting Assistant Secretary of the Army. This letter fails to address the Corps' grossly distorted and superficial treatment of tribal water interests in the PEDIS document. The only way we can interpret Interior's lack of concern is to say that it reflects the intent of the agencies of the United States to curtail any development of tribal water resources for the benefit of our membership, and to allow development by States, by competing Federal interests, and by private water users to the detriment of the Indian people.

By admitting any meaningful treatment of the tribe's substantial water rights, each of the 307 alternatives studied by the Corps will reinforce the continued reliance by the competing interests to waters that are clearly the vested rights of the tribes in the basin.

It should be noted here that the Corps went on record as beginning to recognize the rights of some tribes during their issues conference, held in Omaha, Nebraska last month. Even so, the document will not reflect a realistic estimate of tribal water requirements or the magnitude of the potential impact when those rights are put to beneficial use. Although we appreciate the Corps' attempt to recognize some of the tribes' water requirements, the evaluation of future depletions should be based on entitlements of all the tribes within the basin. To do otherwise will compromise the validity of the document and will not allow the document to meet the NEPA test for adequacy of analysis.

The tribes in the Missouri River basin have sacrificed more than any others to make the intent of the 1944 Flood Control Act a reality. One asks, what have we gained in return? While many believe that the tribes were justly compensated for the lands taken, I assure you this has not been the case. Should the tribes sit back and be content with the mud flats and erosion that threaten our homelands and the development of viable tribal economies? Should we be happy when the bodies of our ancestors continue to wash on shore because our trustee did not follow up on the promises made to our people? Can we find hope in knowing that our water resources help generate over 2,000 megawatts of low-cost power that is marketed to others, while we pay some of the highest electrical rates in the country?

Every day the tribes live with the adverse impacts to their homelands, and we wonder if there is a trustee and why he does not hear our cries for help.

Mr. Chairman, the list of unfulfilled promises and impacts to our homelands is truly a tragedy and warrants further review by this committee. I urge you to honor the tribal request for full Congressional hearings so that all the tribes in the basin can present spe-

cific testimony on how this process adversely impacts our communities.

Once again, on behalf of the Mni-Sose Coalition, I thank you for the opportunity to present our views.

Senator BAUCUS. Thank you very much, Daryl.

Jesse, you are next.

STATEMENT OF JESSE TAKEN ALIVE, CHAIRMAN, STANDING ROCK SIOUX TRIBE, FORT YATES, ND

Mr. TAKEN ALIVE. Thank you, Senator, and Senator Conrad from North Dakota. My name is Jesse Taken Alive. I am honored to be here and thank you for this time and for allowing us to present our concerns on behalf of the Standing Rock Sioux Tribe.

I would like to begin by saying that we do have draft testimony that was sent to your staff, Senator Baucus. What we would like to do is revise that since I have been recently elected as chairman of our tribe, and there are some things that I would like to add and modify in our testimony.

Senator BAUCUS. Surely.

Mr. TAKEN ALIVE. I would like to say that we bring to this hearing an effort—and hopefully, the other people who testified in front of you today will perceive it as a unified effort on behalf of their interests as States or businesspeople—but we bring to this table the relationship as prescribed in our treaties, that being a nation-to-nation relationship. Also, to stress the sovereignty status that arose from the Pick-Sloan Administration regarding water issues. We bring those considerations to this table and we hope that the other people, like I said earlier, who presented testimony will be able to understand that we are in this with them.

Also, Mr. Chairman, we would like to share some of our thoughts and our perceptions, as we have heard this morning presented before you. We heard economic interests talked about; recreation interests; environmental focuses, that the Corps touched on. Our understanding of this and our belief of this is that we don't separate those as Lakota or Dakota people. They are all as one. Economic interests cannot go without human interests; human interests cannot go without economic interests. So we bring those considerations to this table also, Mr. Chairman, because those are our beliefs.

I guess this is exemplified in what we feel is, for our people, a landmark event, when on October 5th we were able to sign an agreement between the North Dakota Reinterment Committee, which is made up of the four North Dakota tribes, and the Corps of Engineers, an agreement involving repatriation issues between our people and the Corps. We are very thankful and grateful for that, but we are going to continue to look at other issues as they affect us. We thank the Corps for their involvement in that.

As we take a look at our reservation and other reservations that have similar concerns and issues, we take a look at the issues regarding health, with diabetes being a major problem on our reservation, as kidney diseases are, as life expectancy for Indian males is. From our data, we see that for Standing Rock it is 43 years old. Also, we take a look at housing issues, education issues.

Amidst all these, Mr. Chairman, we feel that water is paramount among all the considerations on our reservations, as was pointed

out by Mr. Wright. In our language we call water "mni," which is the water of life, or the water is life. So it is very important to us, Mr. Chairman, that our considerations and our concerns are felt and heard by the Corps of Engineers because they do impact us very, very seriously on our reservation.

We are concerned and hope that this doesn't happen, that we are planned out of existence, but with the course and direction that the Corps is taking with their preliminary draft, we feel that this is what is happening, that we are going to be planned out of existence if things like this aren't corrected.

In conclusion, Mr. Chairman, we would like to say that we seek to develop these rights for the benefit of our people. We want to assure a healthy and prosperous lifestyle, as well as a permanent lifestyle, for the people not only from Standing Rock but all of the reservations with in the Missouri River basin.

So once again we thank you for allowing us to present our concerns and issues today, and we hope that the other constituents that you have heard from this morning will feel that this is a unified effort between them and the tribes that are within the Missouri River basin.

Mr. Chairman, thank you for your time.

Senator BAUCUS. Well, thank you very much, Jesse.

I'd like to turn to both Bill and John to describe, if you would, the access problems that exist most times of the year; that is, just how impossible is it to get to the lake. I don't think a lot of people downstream have any understanding of how access to the lake is such a problem. Could you give us some examples, describe how it is?

Mr. LAMB. I'll give you one that relates to Bill Harris' place.

In 1987 I first learned about the walleye tournaments which were going to be held on Fort Peck Reservoir, and I was excited about them. I was living in Missoula, Montana. I wanted to do that sort of thing; I always fancied myself as kind of a good fisherman. So I thought, well, what I need to do is make an exhibitionary-type trip over there and kind of check it out and learn how to catch a walleye, because I had never caught one before.

So I looked at a map, just like anybody else would, and I said, well, the nearest recreational site for me is Crooked Creek, so that's where I'm headed. Fortunately enough I had a 4-wheel drive; I didn't know that I was going to need it. I didn't have any chains; of course, I didn't know that I was going to need them, either. I loaded up my brother and my little boat and off we went.

Well, we were real fortunate. When we got in it was dry. We had a tough time getting there because it seemed like the road went through several ranchers' front yards. I had this nervousness about going into somebody's front yard and continuing to pass through; I have a feeling that I'm trespassing. Of course, I probably was, but I did manage to make it to Crooked Creek Marina.

Well, the fact is that we got in there and we got all set up and we camped, and it started to rain. I noticed a couple of other fellows were busy loading their boats and loading their gear back on their outfits, and they were headed back out. I asked one of the guys, "Was the fishing no good? What's going on?" He said, "You don't know anything about this country, do you?" I said, "Well, no."

He said, "You'd better leave now, because otherwise you're not getting out of here." I didn't believe him, but we ended up staying there a week and a half because we couldn't leave. [Laughter.]

Mr. LAMB. That's just a small description of how I first got introduced to access problems on Fort Peck Reservoir. I can give you an example as early as last week. I have a cabin at the Pines area on Fort Peck Reservoir. One day, it drizzled all day long. By the time I hauled my boat out to my cabin—which I almost didn't make it—there were one-foot ruts in the middle of the road, and this a road that has been graveled and graded and has had tons of money spent on it.

The problem with all that money that we're spending on that road is that it isn't a fix; it's just a Band–Aid. They go back out and they gravel the ruts over, and then you can travel on it when it's dry. If it's wet, you had better have a 4-wheel drive and you had better be prepared to stay if you get in there too far.

Senator BAUCUS. So your basic point is, first of all, that paved access is necessary for most times of the year; and second, there would be a lot more use, and that would greatly increase the economic aspect of it.

Mr. LAMB. That's absolutely correct. Anybody who has any familiarity with the area at all is only going to go there once and not do like I did, move to Glasgow so I could watch the weather so I could know when I could get on the lake and when I couldn't get on the lake. The fact is, as a destination, it virtually doesn't exist because there are no places where you can guarantee—if I want to go fish for smallmouth, I really want to go in on Bone Train. That's an old dirt road that goes down a gully that's down by Don Burke's ranch. Well, I guarantee you, don't go down there if it's going to rain; and if you're on the lake and it starts to rain, hustle out of there because you won't make it up that last hill.

That's the problem with the whole lake. You can't count on being able to do anything on the lake, the way it is currently managed. I think that to a certain extent they manage it that way because if they managed it differently, people would be there and they would be using it, and then the pressure would be even different than the pressure that they're seeing right now.

Senator BAUCUS. That's a very good point.

I would like to ask both of you, Daryl and Jesse, about this famous "Winters Doctrine," that is, whether your tribes have made any effort to quantify the water that your tribes would be entitled to under the Winters Doctrine in which essentially, the Supreme Court decided that the Federal Government must manage water to the benefit of the tribes. It's questionable as to what uses the tribes are entitled to under the Winters Doctrine, but nevertheless, to what degree is the Winters Doctrine relevant to this on how much water is maintained in the upper basin?

Mr. TAKEN ALIVE. I will answer part of it and then defer to Mr. Wright, because the Mni-Sose water represents all of the tribes.

Right now, Standing Rock is not contemplating looking at quantifying water, for numerous reasons. But I guess the answer that you may be looking for can be found with Mr. Wright, because they do represent all of our tribes.

Senator BAUCUS. OK.

Mr. Wright?

Mr. WRIGHT. I guess my response to that, Mr. Chairman, is first of all, whether or not a tribe chooses to quantify, such as the tribes in the State of Montana, is solely a decision that should be made by each and every tribe in getting involved in any process. I think many times the Winters Doctrine rights are misinterpreted, as further defined in subsequent court hearings, that our uses are just pegged to agricultural purposes.

Mr. Chairman, I respectfully ask you to look into the backgrounds of each of the tribes. I believe you will find the language to establish homelands for our people, and homelands do not just mean agricultural purposes. We need to look at our municipal growth, our industrial growth; agriculture is surely a consideration, but these things also need to be addressed as part of any water settlement scenario that may be engaged in, such as the McCarran Amendment proceedings in the State of Montana right now.

Senator BAUCUS. I didn't get a chance to ask Colonel Schaufelberger to comment on this same point.

Colonel, could you just very briefly tell us the degree to which the Corps is considering potential application of Winters with respect to revision of the Master Manual and whether it might make sense to provide a cushion, perhaps, to higher pool levels.

Colonel SCHAUFELBERGER. Sir, in order for us to address the impact of withdrawals pursuant to the Winters Doctrine rights which the various tribes have, we have to know what is the value, how many acre-feet they believe they should have. I have an open invitation to the chairmen of all the tribes to display that information in there.

The only data that I have is for Wind River, Fort Peck, and the Northern Cheyenne. But in order to measure what the potential impacts could be should the water rights be quantified and systems installed to withdraw water out of the reservoirs, or out of the tributaries, or out of the mainstem of the river, we're going to do a sensitivity analysis based on arbitrary selection of potential depletions to determine should some of these occur, what would be the impact. But as far as affecting our operation of the river, we only deal with the water that's in the river. So once the water rights are quantified and some system installed to withdraw that water, then it is treated as a depletion, like any other water supply or irrigation use. All we're looking at is how we manage it. We have no authority to allocate water; allocation is done by the States and by other folks. But that's how we plan to address it.

Senator BAUCUS. We don't have a lot of time here, but Bill, I would like to ask you, could you give us a sense of the number of people that would use your place when there's water, versus when there's no water. What's the economic consequence?

Mr. HARRIS. It's kind of hard to know in exact numbers, but I can say that the first year we were there, with the conditions that John has already described, there were upward of 4,000 visitors there, and we didn't advertise at all. We weren't ready for them, basically; we were just starting to build. Most of these people came from the Yellowstone Valley. The grass roots group there is the small towns around us. They have been fighting to get in there for years.

To add to his story a little bit, it used to be, before this new road was built in 1987 and 1988, the first group in in the spring brought 4-wheel drive pickups loaded with old broken-off fenceposts, and they filled all the washouts with the fenceposts so they could get their 4-wheel drives in to fish, and then they let everybody else know that they were filled so that they could get into the lake. That's how access has been in the past.

But I think in numbers, what you're searching for probably is the area of access, and the area of access is the biggest population area in the State of Montana. What we're looking at is three hours from Billings, an easy three hours. Billings is the largest city in the State and they really have no big water recreation. They have one other reservoir that's pretty crowded, not too far away, and Yellowstone Valley doesn't even have very many big boat owners because there's no place to take them. It's sort of unheard-of, that there would be that large population and no big boats. But with big boats you need facilities and you need roads.

Senator BAUCUS. And you need water.

Mr. HARRIS. And you need water. [Laughter.]

Senator BAUCUS. Thanks, Bill.

Senator Conrad?

Senator CONRAD. Thank you, Mr. Chairman.

I wanted to ask Chairman Taken Alive—first of all, to congratulate him on his recent election——

Mr. TAKEN ALIVE. Thank you.

Senator CONRAD [continuing]. And to ask, has Standing Rock Sioux Tribe been involved in this process of revision of the Master Manual? And if not, how important is that to you and what are the implications of not being included?

Mr. TAKEN ALIVE. Well, obviously it is very important to us. I will share an example with you to show our relationship with the Corps with regard to the invitation by the Colonel just now. He invited us—and I appreciate that; I'll use the scenario in a lot of our negotiations with governmental agencies. It's kind of like being invited to a basketball game, if you will. While we can get in the door with the invitation, our question is, are we going to be fans or spectators? Or are we going to be actual players?

We are optimistic, like I said earlier, with the signing of this October 5th agreement regarding repatriation. Our feelings are that we've got a player on the bench now; we have a substitute, if you will, on the bench now, and I hope everybody can understand that.

Senator BAUCUS. You need to get him into the game.

Mr. TAKEN ALIVE. Yes, we want to get him into the game. And I appreciate that invitation by him.

But what I will do, Senator, I would like to defer that other part of the question to one of our staff attorneys with our reservation water resources; that will be Les England.

Senator CONRAD. By the way, Mr. Chairman, you ought to know that Jesse Taken Alive was a pretty good basketball player in his time.

Mr. ENGLAND. Senator, I believe the question was, how does the lack of involvement of Standing Rock in development of the Master Manual affect the tribe?

The tribe has submitted to the Corps recently, and has attempted to develop irrigation out of the Missouri River, and those intakes have been literally taken out of the water. The municipal drinking system for the entire reservation has likewise been lifted out of the water as the levels went down. Those two examples are the most dramatic effects on the reservation.

Senator CONRAD. What was the cost of restoring water supply as a result of that?

Mr. ENGLAND. Upwards of a million dollars.

Senator CONRAD. All right.

Senator BAUCUS. Thank you very much.

I have no further questions at this point.

I want to thank all of you. Some of you have come great distances, and you have added new perspectives and insights which are all very constructive and very helpful.

I particularly want to say to people who are unable to come to the microphone and make points or ask questions, we are unfortunately unable to do so because of the time it took to hear the witnesses. But if you have points you want to make or questions you want to ask, write them to me, to the committee, or to Senator Conrad or both, and we will look at those and receive them with the same interest and effort as we have the others during this oral presentation here.

Senator BAUCUS. Thank you all very much. I think it has been a very constructive hearing. It has been very helpful. We have a much better record than we had in the past to make sure we're successful, and I thank you all for being part of this common solution. I appreciate it.

The hearing is adjourned.

[Whereupon, at 11:53 a.m., the committee adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record follow:]

UNITED STATES ARMY
CORPS OF ENGINEERS

COMPLETE STATEMENT

OF

COLONEL JOHN E. SCHAUFELBERGER
MISSOURI RIVER DIVISION ENGINEER

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ON

STATUS OF THE MISSOURI RIVER MASTER WATER CONTROL MANUAL REVIEW AND UPDATE

GLENDIVE, MONTANA

OCTOBER 11, 1993

NOT TO BE RELEASED UNTIL APPROVED BY THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

UNITED STATES ARMY
CORPS OF ENGINEERS
COMPLETE STATEMENT
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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

INTRODUCTION

I am honored to be testifying before you today regarding the status of the Missouri River Master Water Control Manual Review and Update. Accompanying me today are Mr. Arvid Thomsen, Director, Civil Works and Planning Directorate, Missouri River Division and Mr. Duane Sveum, Chief, Reservoir Control Center, Missouri River Division.

The Missouri River Mainstem System consists of six dams and reservoirs located in Montana, North Dakota, South Dakota, and Nebraska and the Missouri River Navigation and Bank Stabilization Project from Sioux City, Iowa, to the mouth at St. Louis, Missouri. The six dams are Fort Peck, Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point. The six dams form six major reservoirs on the Missouri River: Fort Peck Lake, Lake Sakakawea, Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake. Construction of the Mainstem System dams was completed in 1964. The system first filled to normal operating level in 1967. The Missouri River Master Water Control Manual (Master Manual) for the operation of the Mainstem System was first published in December 1960. The Master Manual was revised in 1973, 1975, and 1979.

The impacts associated with the recent drought in the upper Missouri River basin prompted numerous inquiries from the public, State and Federal agencies, private companies, publicly- and privately-owned utilities, and Congressional members regarding the operation of the Mainstem System. In response, the Corps initiated a review of the current Master Manual in November 1989 to determine if the current Water Control Plan described in the Master Manual is the plan that best meets the contemporary needs of the Missouri River basin. The

review has taken the form of a study called the Missouri River Master Water Control Manual Review and Update (Study).

The Study consists of technical studies; alternatives development; and economic, environmental, and social impact assessments. It includes all environmental studies and public and agency involvement required by the National Environmental Policy Act (NEPA) and other statutes and regulations.

This testimony will describe the environment of the Missouri River and the uses made of the water. I will describe the current water control plan and the alternatives to that plan that are currently under consideration. I will also cover the effects of these various alternatives. The Study has proceded with extensive public involvement which I will briefly describe. I will conclude by giving you the current status of the Study.

WATER QUALITY

Missouri River water is used extensively for water supply and is essential habitat for fish and wildlife. The water quality is generally good, and the reservoirs have had only minor problems. Water quality concerns are primarily due to diffuse contaminants; agricultural practices; mining, coal, and oil development; sewage treatment problems; and sediment and nutrient inputs to the reservoirs.

Low dissolved oxygen concentrations, when they occur, are typically the result of impoundment or of reservoir operation. Operational controls to alleviate this problem are limited because the Mainstem System dams were not constructed with multiple level outlets. Low dissolved oxygen concentrations may result in an influx of metals such as iron and manganese from the bed sediments into the water column.

WETLAND AND RIPARIAN VEGETATION

Water levels and flows affect abundance, distribution, and species composition of wetland and riparian vegetation. The Missouri River floodplain currently supports significant stands of riparian forest and includes numerous old channels that have been cut off from the river forming oxbow lakes. Within the active channel of some reaches, the process of erosion and deposition still creates islands, sandbars, chutes, and backwaters that support a variety of wetlands. Deltas have developed in the reservoirs of the six Mainstem System dams, supporting additional extensive wetland complexes. The wetlands along the river and in deltas serve many important functions: wildlife habitat (waterfowl, big game, furbearers, etc.), fish breeding and foraging habitat, nutrient/sediment trapping, flood control, and recreation. Riparian forests serve as important wildlife habitat, timber sources, wind shelters for residences, and locations for recreational activities.

WILDLIFE

The Missouri River creates and maintains important forest and wetland habitat for a wide diversity of wildlife including at least 60 species of mammals, 301 species of birds, and 52 species of reptiles and amphibians. Of these, 6 bird and 2 bat species in the river valley are Federally listed as threatened or endangered. Because much of the river's course traverses the arid Great Plains, where less than 5 percent of the land supports trees, the densities and distributions of many of these wildlife species depend on the forests and wetlands associated with the river.

The Mainstem System is within the central flyway in which millions of waterfowl migrate and breed. The Missouri River and its associated lakes and wetlands provide important migration stopover habitat and, in times of drought when habitat in the North and South Dakota prairie pothole region is limited, important breeding habitat. The river and its associated wetlands support approximately 61 species of shorebirds, wading birds, and waterbirds. All are dependent upon Missouri River hydrology for supplying sandbars, shorelines, and shallow water zones that meet nesting and foraging needs.

A variety of other wildlife, including upland game birds, furbearers, big game, raptors, bats, songbirds, cavity-nesting birds, reptiles, and amphibians, rely on Missouri River habitats that are tied to Missouri River hydrology. Upland game birds are especially dependent upon emergent wetlands and riparian forests. They also heavily use dense, weedy, herbaceous vegetation that establishes on exposed shoreline sediments in the three upper reservoirs when water levels are drawn down.

The principal big game species are white-tailed deer, which occur along the entire river, and mule deer, which occur primarily in Montana, North Dakota, and South Dakota. Both species forage, fawn, and seek winter cover in riparian and wetland vegetation. During drought years, deer feed on the vegetation established on areas exposed by lowered reservoir levels. Bighorn sheep and elk occur on the Charles M. Russell National Wildlife Refuge near the upstream end of Fort Peck Lake. Although primarily an upland species, pronghorns occasionally extend into the Montana and Dakota portions of the Missouri River floodplain.

The Missouri River provides breeding habitat for three bird species Federally listed under the Endangered Species Act (ESA)--the endangered interior least tern and bald eagle, and the threatened piping plover. It also provides migration and wintering habitat for the endangered peregrine falcon and whooping crane. The river valley potentially provides habitat for the endangered Eskimo curlew, gray bat, and Indiana bat.

Least terns and piping plovers typically nest in colonies on riverine sandbars isolated by water. Their nesting habitat requirements are similar, usually consisting of river sandbars, islands, and lakeshore peninsulas, where access by mammalian predators is minimized and foraging habitat (shallow water for terns and shorelines for plovers) is nearby. Both species nest in shallow, inconspicuous depressions in dry, open, sandy areas with less than 30 percent vegetative cover and plant heights less than 1 foot.

FISH

Over 156 fish species have been documented in the Missouri River. These species include a wide variety of native species and numerous species that have been introduced into the reservoirs and riverine stretches of the river. The habitat types available and, correspondingly, the species composition of the Missouri River differ considerably between the riverine and reservoir segments. Because of the differences in species composition as well as the physical characteristics between the riverine reaches and the reservoirs, the mechanisms affecting fish production are also very different.

The most important sportfish in the riverine stretches are walleye, sauger, white bass, yellow perch, channel catfish, paddlefish, shovelnose sturgeon, and northern pike. Trout, salmon, and smallmouth bass are also targeted in many of the tailrace fisheries. Other common species in the river include carp, river carpsucker, shorthead redhorse, freshwater drum, and goldeye. Shortnose gar, gizzard shad, flathead chub, blue sucker, and several shiners are also common in some parts of the river.

Many native species are declining because of habitat changes and competition from introduced species. Shallow, low-velocity habitat in backwaters, side channels, oxbows, and tributary deltas are limited. Deep, slow-velocity habitat in the main channel, important to many larger fish, is declining. There are few pools and snags in the main channel.

One of three native species of sturgeon remains common in the river, the shovelnose sturgeon. Lake sturgeon is a candidate species for Federal listing under the ESA. The pallid sturgeon is now rare and is Federally listed as an endangered species.

The range of pallid sturgeon encompassed the middle and lower Mississippi River, the Missouri River, and the lower reaches of the Platte, Kansas, and Yellowstone Rivers. Because the pallid was not recognized as a distinct species until 1905, little is known about its abundance and distribution prior to that date. Subsequent fishery studies suggest a probable decline in pallid sturgeon abundance. According to the U.S. Fish and Wildlife Service's Pallid Sturgeon Recovery Plan, modification of the natural hydrograph, habitat loss, migration blockage, pollution, hybridization, and over harvest are probably all responsible for this decline.

The six reservoirs on the mainstem of the Missouri River contain a diverse community of coldwater, coolwater, and warmwater fish. The upper three reservoirs have been stocked with coldwater game and forage fish species to take advantage of the coldwater habitat that forms in the lower depths of the reservoirs. These species include chinook salmon, brown and rainbow trout, lake trout (Fort Peck Lake only), cisco (forage in Fort Peck Lake), and rainbow smelt. Species in the lower three reservoirs and in the warmer waters of the upper reservoirs include native and non-native species that have adapted to lacustrine conditions.

FLOOD CONTROL

Approximately 1.1 million acres of agricultural land is subject to flooding along the Missouri River. Eighty-eight percent of these acres are located downstream from Gavins Point Dam. Corn is the primary crop cultivated, followed by soybeans and wheat. The total value of this land is estimated at $251 million.

Nonagricultural resources include residential and nonresidential structures situated in areas along the Mainstem System that are subject to flooding. There are 22,529 residential buildings worth approximately $1.3 billion located within the identified flood hazard areas. There are 3,303 nonresidential buildings subject to flooding, with a total value of approximately $9.5 billion.

Flood flows greater than a 25-year flood event have the potential to adversely affect navigation on the Missouri River. Navigation losses result from interrupted service; the duration of the interruption depends upon the length of river affected and the magnitude of the flood.

The objective of flood control is to regulate releases from dams to reduce flood damages in the floodplains.

WATER SUPPLY

Water is withdrawn from the Missouri River and its Mainstem System reservoirs for cooling purposes in the production of electricity; municipal water supply; and commercial, industrial, irrigation, domestic, and public uses. More than 1,600 intakes and intake facilities have been identified on the reservoirs and river reaches of the Mainstem System.

Access to the water rather than quantity of water available is the main concern of the intake operators. During drought periods low reservoir levels and low river flows have resulted in water availability problems at some intakes. Low flows and low pool levels also alter sediment deposition and sandbar formation, which may further restrict the flow of water to the intakes. During the winter ice formation can further complicate water availability, particularly in the lower river reaches during low flows. During the summer months, toxic algae blooms could require shutdown of municipal intake facilities for a certain period of time, particularly those located on the reservoirs.

Changes in river flows and reservoir pool elevations affect the cost of operating intake facilities. Low water levels may increase day-to-day operating costs, or in extreme cases, lead to capital costs for intake modification or location of an alternative water source, or even shutdowns.

Twenty-five electric generating stations, including coal- and nuclear-fired powerplants, are located on the Mainstem System in order to draw cooling water for their steam-electric generating processes. The powerplants have a gross electric generating capacity of 15,084 megawatts (MW). Seventy-four percent of this capacity is produced by powerplants in the river reaches downstream from Gavins Point Dam. While most of the major powerplants are coal-fired, there are three nuclear powerplants. The nuclear powerplants have a combined generating capacity of 2,556 MW. Of the 25 powerplants, four (one nuclear) with a combined generating capacity of 3,634 MW, use cooling towers. The remainder use once-through cooling, which requires much more water per unit of generating capacity.

Some powerplants could have problems with thermal water quality standards compliance during low river flows. Powerplants that use once-through heat rejection systems are required by law to meet discharge permit requirements for discharging cooling water back into the river.

Missouri River water is also used for municipal and industrial uses. Municipal use is for public supply of water to over 3 million residents of cities and towns and rural water districts

or associations. Industrial use is for manufacturing or processing purposes other than powerplant use.

Numerous private irrigators withdraw water from the reservoirs and the river to increase crop yields or to grow crops that otherwise could not be grown in the area. Most are located in the upper basin where the annual rainfall is less and the growing season is shorter than in the lower basin. The majority of irrigation intakes are portable and are placed to access water at a low cost. However, adjusting intakes to changing water surface elevations can be costly, especially along gently sloping shorelines.

Rural domestic use includes lawn, tree, and small garden irrigation, stock watering, agricultural spraying, or other small agricultural uses in connection with domestic needs, and other domestic uses, excluding drinking water. Most domestic intakes serve one household, and many may be used only on a seasonal basis. The majority of the domestic intakes are portable and are located on the upper two reservoirs (Fort Peck Lake and Lake Sakakawea) and in the river reach below Fort Peck Dam. Most of these intakes are placed in the annual operating zone of the reservoirs. When the water surface elevation falls below that zone, owners have to move their pumps or extend their pipeline to continue intake operation.

Public intakes provide water for parks, golf courses, general recreation, and fish and wildlife. Most public intakes are located in the reservoirs and river reaches above Gavins Point Dam. Low water surface elevations may result in increased operation and maintenance costs or capital costs for intake extension, modification, or development of an alternative source. Some fish hatcheries could be forced to shut down during periods of low water levels.

HYDROPOWER

At the six Mainstem System dams, there are 36 hydropower units with a combined capacity of 2,409 MW. These units provide an average of 10 million megawatt-hours per year, or about 9 percent of the energy used in the Mid-Continent Area Power Pool region. This region includes all of Iowa, Minnesota, Nebraska, and North Dakota; most of South Dakota; and portions of Illinois, Montana, and Wisconsin. Power generated at the Missouri River Mainstem System dams is marketed within this region by the Western Area Power Administration of the U.S. Department of Energy.

Nearly all of the water released passes through hydropower turbines. Generally, flood waters in the upper Missouri River basin are stored in the reservoirs and used later for power generation. It is only during flood storage evacuation events that water must be passed through the flood control outlets or emergency spillways, bypassing powerhouses. This occurs most often at Gavins Point Dam, where water releases exceed the capacity of the powerhouse about 25 percent of the time.

RECREATION

The six large lakes of the Mainstem System and the reaches between and below these lakes provide recreation opportunities to residents of the states and Indian reservations through

which the river flows, as well as to those of neighboring states. Recreational activity is a source of income for businesses catering to boating, hunting, fishing, camping, and other recreational pursuits, as well as service establishments located near the river.

There are a variety of recreational opportunities on the Mainstem System. Water-based recreation includes boating, boating-related activities, and swimming. Sport fishing is a primary component of recreation along the entire system. The wetlands along the river corridor provide waterfowl habitat, and waterfowl hunting is popular. Hunting for small and large game such as squirrel, rabbit, and deer occurs on land along the reservoirs and river. The aesthetically pleasing character of the lakes and river reaches attract sightseers. Camping facilities vary from fully developed to primitive. Yearly visitation at the Mainstem System lakes and river reaches above Gavins Point Dam is estimated at 5,948,000 recreation days. Yearly visitation along the river reaches below Gavins Point Dam is estimated at 2,746,000 recreation days.

NAVIGATION

The Missouri River Navigation and Bank Stabilization Project was designed to prevent uncontrolled river meandering and bank erosion and to facilitate reliable navigation. This project, authorized by Congress in the River and Harbor Act of 1945, provides for a 9-foot-deep channel, 300 feet wide, from Sioux City to the mouth of the river at St. Louis, a distance of 735 miles. Construction of the navigation works was complete in September 1981, although corrective work will be required as the river continues to form its channel in response to changing flow conditions.

Navigation on the Missouri River is limited to the normal ice-free season of 8 months. At Sioux City, the full-length season extends from March 23 to November 22. At St. Louis, the full length season extends from April 1 to December 1. When water supplies are above normal, a 10-day season extension is provided.

Major commodity groups transported on the Missouri River include farm products, food products, chemicals, petroleum products, building products, sand and gravel, and water materials used to maintain the bank stabilization and navigation channel. Commercial volume, which excludes sand and gravel and waterway materials, peaked in 1977 at 3.3 million tons. During 1984 through 1988, total volume transported via Missouri River navigation averaged 6.7 million tons per year and commercial volume averaged 2.5 million tons per year.

SOCIOECONOMIC

Seven states and twelve Indian reservations border the Missouri River Mainstem and benefit directly from the presence of the river. The states are Montana, North Dakota, South Dakota, Nebraska, Iowa, Kansas, and Missouri. The Indian Reservations are the Fort Peck, Fort Berthold, Standing Rock, Cheyenne River, Lower Brule, Crow Creek, Yankton, Santee, Winnebago, Omaha, Iowa, and the Sac & Fox. The Mainstem System is valuable for flood

control, recreation, hydropower, transportation, fish and wildlife, and water supply. These activities provide economic activities and jobs. In addition, operation of the mainstem reservoirs affects flows in the Mississippi River and, therefore, could affect transportation and the economies of Illinois, Kentucky, Tennessee, Mississippi, Arkansas, and Louisiana.

HISTORIC PROPERTIES

Historic properties include historic and prehistoric archaeological sites, historic architectural and engineering features and structures, and resources of traditional cultural or heritage significance to Native Americans and other social or cultural groups. Paleontological resources are fossils of prehistoric plants and animals. Nearly 1,200 historic properties were evaluated for the study in Fort Peck Lake, Lake Sakakawea, and Lake Oahe within the range of pool elevations affected by potential changes in the current Water Control Plan.

CURRENT WATER CONTROL PLAN

The existing Master Manual describes operation of the reservoir system for the multiple purposes of flood control, hydropower, water supply, water quality, irrigation, navigation, recreation, and fish and wildlife. Criteria for operations include how reservoir storage is allocated and how water is released from reservoirs during navigation and non-navigation periods for all potential system inflows.

There is a total of 73.5 million acre-feet (MAF) of reservoir storage available in the Mainstem System reservoirs. The uppermost zone, the exclusive flood control zone, has a total storage of 4.7 MAF and is reserved to capture extremely large flood runoffs. Immediately below the exclusive flood control zone is the annual flood control and multiple use zone which totals 11.7 MAF of storage. This is the zone that is normally empty at the beginning of the high runoff season (March), fills during spring and early summer runoff, and is emptied again during fall and winter. Below the annual flood control and multiple use zone lies the largest storage zone, 53 percent, which is used for all purposes during droughts. It is called the carryover multiple use zone. Water in the carryover multiple use zone provides continued support for all purposes during drought periods but at reduced levels. This zone of the reservoir system remains full during periods of normal inflow, and is gradually drawn down during drought periods. Releases from this zone during drought periods are a major part of the study. The lowest storage zone is called the permanent pool. It is designed to remain full even through a drought similar to the one experienced in the 1930's.

The Master Manual provides criteria for navigation season length and water flow levels during navigation and non-navigation periods. Each criterion relates to the amount of water in storage. As the amount of water in the system is used during an extended drought, the navigation season length and flow levels are progressively reduced to conserve water. The criterion would allow use of all the water in the carryover multiple use zone if the drought of the 1930's were repeated.

Navigation service level is determined by the quantity of water in storage on March 15. If there are at least 54.5 MAF in storage, reservoir releases necessary to provide a channel depth of 9 feet are provided. If there are 46 MAF or less on that date, reservoir releases are reduced by 6,000 cubic feet per second. This results in a channel depth reduction of approximately one foot. For intermediate storage levels, releases are interpolated. If there is not sufficient water in the carryover multiple-use zone to provide the reduced level of service for at least four months, navigation service is suspended.

The navigation season length is based on the amount of water in storage on July 1. A full-length season of 8 months (March 23 to November 22 at Sioux City) is supported by system releases if there are 41 MAF or more in storage. For storage levels from 41 down to 25 MAF, the navigation season is shortened progressively from November 22 to September 7.

The winter non-navigation target release is based on the volume of water in storage on September 1. If water in storage is 58 MAF or higher, 16 thousand cubic feet per second (kcfs) is released from Gavins Point Dam. Releases are reduced as the volume of water in storage declines.

The current Water Control Plan requires that sufficient flow be provided for intakes below the reservoir system. Experience during the recent drought indicates that an average of 12 kcfs is required in winter and 9 kcfs during other seasons.

ALTERNATIVE WATER CONTROL PLANS

The search for a water control plan that best serves the contemporary uses of the Mainstem System has focused on two primary features of the Water Control Plan:

1. The amount of system storage reserved for the permanent pool and the resulting size of the carryover multiple use zone available for use during droughts; and

2. The quantity and timing of releases for various needs (e.g., navigation, water supply, irrigation, power production, water quality, flood control, recreation, and environmental quality).

The sizes of the exclusive and annual flood control zones are based on storage requirements for the 1881 record flood, the height of the dams, and the elevation and capacity of outlet works and spillways. None of these physical factors have changed; therefore there is no basis for changing the size of the flood control storage zones. Potential changes are in the use of the remaining 57.1 MAF comprising the carryover multiple-use zone and the permanent pool.

Specific changes to the quantity and timing of releases to support various needs were also considered in developing new alternatives, including the following:

- Changes in the criteria including both navigation service level and season length;

- Changes in service level downstream from Gavins Point Dam during non-navigation periods;

- Changes in Gavins Point Dam spring and summer releases to improve the Missouri River ecosystem;

- Modifying intrasystem regulation of the upper three reservoirs to provide favorable conditions for fish reproduction in the river below each dam and in each reservoir once during each 3-year period;

- Changes in restrictions on spring and summer releases of water to protect threatened and endangered birds that nest on river islands.

Numerous alternative water control plans incorporating these potential changes have been identified. They can be separated into two groups: a group designed to improve National Economic Development (NED alternatives), and a group designed to improve Environmental Quality (EQ alternatives).

More than 277 NED alternatives have been evaluated. The navigation service level and season length criteria used in the current Water Control Plan were modified for all NED alternatives to reduce navigation service levels earlier in a drought. This was done because in the long run all uses, including navigation, benefitted from the more conservative rationing. A modified intrasystem regulation was also applied to each of the NED alternatives. The modified intrasystem regulation is designed to favor each of the upper three reservoirs once over a 3-year cycle to provide better conditions for fish reproduction in the river below the dam and in the reservoir.

Six permanent pool levels were evaluated: 18 MAF, 26 MAF, 31 MAF, 38 MAF, 44 MAF, and 48 MAF. The following non-navigation minimum flows for the winter, spring/fall, and summer seasons were evaluated: 9 kcfs, 12 kcfs, 15 kcfs, 18 kcfs, and 25 kcfs.

Over 30 EQ alternatives have been evaluated. The primary goal of the EQ alternatives is to replicate the natural river flow cycle with high flows in the spring and early summer and reduced flows in the late summer and early fall. The reduced flows result in either reduced or no-navigation support. Periods of 1 and 2 months of no-navigation support were evaluated. Alternatives with- and without-flood-control constraints were included. August is the month with no navigation support for alternatives with 1 month of no navigation support. August and September have no navigation support when there are 2 months of no navigation support. All EQ alternatives include the modified navigation criteria and the modified intrasystem regulation described for the NED alternatives.

EVALUATION OF ALTERNATIVES

Alternatives are being compared in terms of economic and environmental performance. Economic factors include flood control, water supply, hydropower, recreation, and navigation. Environmental factors include wetlands, riparian lands, interior least terns and piping plovers

habitat, reservoir fish production, reservoir coldwater habitat, river coldwater habitat, river warmwater habitat, river physical habitat, and historic properties.

SUMMARY OF ECONOMIC EFFECTS

Lower service levels downstream from Gavins Point Dam during non-navigation periods generally result in higher economic benefits as long as service is not reduced below certain thresholds that require major expenditures for water users along the river. Such thresholds are approached when average releases drop below 12,000 cubic feet per second during winter and 9,000 cubic feet per second during other seasons.

Changing the permanent pool has little effect on flood control, water supply, and recreation benefits. Higher permanent pools provide greater hydropower benefits and lower navigation benefits. The increases in hydropower are nearly equal to the reductions in navigation resulting in total system economic benefits being relatively insensitive to changes in permanent pool levels.

The EQ alternatives with a 2-month period of no navigation support provide nearly the same recreation, hydropower, and water supply benefits as the NED alternatives on a percentage basis. Flood control benefits are reduced less than 10 percent and navigation benefits are reduced as much as 40 percent. In general, the EQ alternatives tend to provide about $20 million fewer economic benefits per year than the NED alternatives.

SUMMARY OF ENVIRONMENTAL EFFECTS

Lower service levels downstream from Gavins Point Dam during non-navigation periods have little effect on wetlands, riparian, or tern and plover habitat. Generally, lower service levels tend to produce better reservoir fish production and more coldwater habitat in the reservoirs and river. Poorer warmwater and physical river habitat and greater impacts to historical properties result from these lower service levels.

Changing the permanent pool has little effect on wetland, riparian, or river physical habitat. Higher permanent pools tend to increase tern and plover habitat, reservoir fish production, reservoir coldwater habitat, and river coldwater habitat. There is less river warmwater habitat and a greater impact on historic properties with higher permanent pools.

The EQ alternatives with a 2-month period of no navigation suppport tend to provide nearly the same wetland habitat, reservoir fish production, reservoir coldwater habitat, river coldwater habitat, river warmwater habitat, and impact on historic properties as the NED alternatives. These alternatives tend to provide less riparian and tern and plover habitat than the NED alternatives. The EQ alternatives provide improved river physical habitat.

MISSISSIPPI RIVER

Releases from Gavins Point Dam affect flows on the Mississippi River from St. Louis to its mouth. The effects are most pronounced from the mouth of the Missouri River at St. Louis to the mouth of the Ohio River at Cairo, Illinois. A change from the current Water Control Plan would cause little difference in average monthly Mississippi River flow at St. Louis for the 93-year simulation period. There are, however, critical low flow periods during which the Missouri contribution to Mississippi River flow could be important to navigation.

One of the critical periods during the the 93-year simulation period is October and November 1939. The difference in value to Mississippi River navigation among the alternatives varies as much as $200 million in 1939. However, such critical periods occur on only four occasions in the 93-year period and values averaged over the entire period show little variance, especially when based on a percentage of the total value of Mississippi River navigation.

The addition of navigation service for the Mississippi River at St. Louis was also investigated. Three levels of Mississippi River navigation service were studied. The analysis showed that this service could alleviate some of the critical period Mississippi River navigation impacts. However, averaged over the entire 93-year simulation period, they would result in a very small percentage change to the total Mississippi River navigation benefits and a large percentage reduction in Missouri River navigation benefits.

SELECTING A PREFERRED PLAN

In accordance with policy, the preferred plan would be the plan with the greatest net benefits consistent with protecting the Nation's environment unless there are overiding reasons for recommending another plan, based on Federal, State, local, and international concerns. The total NED economic output of the system can be maintained within a few percentage points of maximum for a very broad range of alternatives. This range is broad enough that it does not appear to limit the consideration of any other factor. Because it does not constrain the preferences, total NED economic output is not likely to be a distinguishing factor in selecting the preferred plan.

There are some differences and minor conflicts among the nine environmental factors; however, over a long period they are quite compatible. The most distinguishing factor is the improved physical habitat for native riverine fish species (including the endangered pallid sturgeon) provided by the EQ alternatives. None of the NED alternatives result in substancial improvment to physical habitat for native riverine species.

Distribution of the economic effects of drought among project uses is a consideration. Navigation receives the greatest percentage reduction in benefits during a drought. This is because navigation is a large water user and is affected the most by conservation measures during water shortages. Also, higher permanent pool alternatives provide less water for navigation and other riverine uses during droughts.

The current Water Control Plan and the NED alternatives with the smallest permanent pool provide the most even distribution of NED economic effects during droughts on a percentage basis. The distribution becomes more unbalanced with the intermediate pool NED

alternatives and the smallest permanent pool EQ alternatives. The distribution becomes extremely unbalanced for the NED alternatives with the larger permanent pools and the EQ alternatives with the intermediate and largest permanent pools.

Distribution of the economic effects of a drought among the affected States is also a consideration. The most even distribution is provided by the smallest permanent pool EQ alternatives followed closely by the EQ alternatives with intermediate permanent pools and the NED alternatives with the largest permanent pools. The most uneven distribution results from the current Water Control Plan and the largest permanent pool EQ alternatives.

Three of these four plan selection considerations are fairly compatible. Total NED economic output, environmental quality, and even geographical distribution of the economic effects of drought appear reasonably well served by the EQ alternatives with the smallest and intermediate permanent pools. This preference is driven primarily by the improved physical habitat for native riverine fish species provided by the EQ alternatives. However, the EQ alternatives with the smallest and intermediate permanent pools do not provide an even distribution of NED economic effects among uses during droughts. These alternatives result in a considerable shift of the effects of drought from water supply, hydropower, and recreation to navigation.

We will continue to search for alternatives that provide substantially improved physical habitat for native riverine fish species without causing a large reduction in economic benefits or a disproportionate share of the effects of drought to bear on navigation.

PUBLIC INVOLVEMENT AND AGENCY COORDINATION

This review of the Master Manual was initially considered because of concerns of the public, State and Federal agencies, private companies, publicly and privately owned utilities, and congressional interests regarding the operation of the Mainstem System.

Phase 1 was initiated in November 1989. The primary objectives of Phase 1 were to develop a range of operating alternatives to address basin concerns, to complete sufficient preliminary analyses to identify alternatives that merit further study, and to identify data gaps and weaknesses in evaluation methodologies.

A draft Phase 1 report was issued in May 1990 and public meetings held to identify public concerns and issues. It was concluded that significant change had taken place since the current water control plan was developed and that there was insufficient information to determine the impacts of potential changes to the plan. Consequently, a complete, detailed analysis was proposed.

Public meetings were held in Helena, Montana; Bismarck, North Dakota; Pierre, South Dakota; Kansas City, Missouri; and Council Bluffs, Iowa in June 1990. The meetings were held to obtain comment on the Phase 1 report and additional public input regarding the alternatives that should be evaluated and issues that should be addressed in the study. A preliminary study scope was developed for Phase 2 based on the comments received.

A series of scoping meetings were held in October 1990 at Helena, Montana; Glasgow, Montana; Bismarck, North Dakota; Pierre, South Dakota; Memphis, Tennessee; St. Louis, Missouri; Kansas City, Missouri; and Council Bluffs, Iowa. The Phase 2 Study plan was

modified based on comments made at these meetings. A detailed summary of comments and Corps responses was presented in a scoping document entitled "Scope of Environmental Impact Statement" dated May 1992.

Special activities were designed to encourage and facilitate participation by the Indian Tribes of the basin. We attended the first Missouri River Basin Tribal Conference in September 1990. The schedule for scoping meetings was presented and the Tribes were encouraged to participate in this important initial step. Two special meetings to inform Tribes of the studies and encourage participation were held in December 1990 in the lower basin, and April 1991 in the upper basin. We attended Missouri Basin Tribal Conferences in June 1992, January 1993, and June 1993. We funded a basin Tribal Conference in July 1993 to facilitate the Tribes' technical review of the preliminary results.

The Phase 2 Study plan identified studies that were necessary to obtain additional data and develop methodologies to define the system operation and economic, social, and environmental impacts of those plans that merited further study. Refinements were made to the model used to simulate monthly discharges and reservoir levels. Economic and environmental effects models were developed to predict effects of the various alternatives being considered. Detailed studies of the navigation industry, water supply users, river water quality, recreation, hydropower, socio-economic system, wetlands, historic properties, and wildlife and fish habitat were conducted.

The following agencies contributed to these efforts:

U.S. Army Corps of Engineers District, Omaha
U.S. Army Corps of Engineers District, Kansas City
U.S. Army Corps of Engineers District, St. Louis
U.S. Army Corps of Engineers Division, Lower Mississippi Valley
U.S. Army Corps of Engineers Division, North Pacific
U.S. Army Corps of Engineers Waterways Experiment Station
U.S. Army Corps of Engineers Institute for Water Resources
U.S. Army Corps of Engineers Waterborne Commerce Statistics Center
U.S. Army Corps of Engineers Cold Regions Research and Engineering Lab
U.S. Army Corps of Engineers Hydrologic Engineering Center
U.S. Fish and Wildlife Service
U.S. Bureau of Reclamation
U.S. Bureau of Indian Affairs
U.S. Department of Energy
U.S. Geological Survey
U.S. Department of Transportation
U.S. Department of Agriculture
U.S. Environmental Protection Agency
National Park Service
Tennessee Valley Authority
Montana State Agencies
North Dakota State Agencies
South Dakota State Agencies
Wyoming State Agencies

Nebraska State Agencies
Kansas State Agencies
Iowa State Agencies
Missouri State Agencies
Illinois State Agencies
Kentucky State Agencies
Tennessee State Agencies
Arkansas State Agencies
Mississippi State Agencies
Louisiana State Agencies
Missouri Basin Indian Tribes

The governors of the Missouri River basin established an oversight committee to actively participate in the study. This committee eventually became the Missouri River Basin Association and included the Federal agencies and Indian Tribes. This association formed four technical subcommittees to assist in the collection of data, development of evaluation methodology, and review of results. It also sponsored a technical review of interim results in the fall of 1992.

In May 1993, a preliminary draft of the study results was distributed to all agencies for any final input prior to distribution for public review. This input was discussed at a meeting of all agencies on September 29 and 30 and October 1, 1993.

Many additional meetings have been held throughout the study at the request of states, tribes, agencies, and interest groups to discuss study process, status, and interim results.

STATUS

We are now preparing the draft for public review in accordance with the discussions held two weeks ago with the other agencies. Public review is scheduled to take place between March and July of next year. The final decision on how to operate the system in the future will be described in the Final Environmental Impact Statement that will be prepared after a complete public review.

Mr. Chairman, this concludes my statement.

TESTIMONY

MARK A. SIMONICH

DIRECTOR OF THE MONTANA DEPARTMENT

OF NATURAL RESOURCES AND CONSERVATION

BEFORE THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

ON THE

STATUS OF THE MISSOURI RIVER MASTER WATER CONTROL MANUAL REVIEW

OCTOBER 11, 1993

Mr. Chairman, members of the committee, my name is Mark Simonich and I am here representing Montana Governor Marc Racicot. I am the Director of the Department of Natural Resources and Conservation, the state executive agency primarily responsible for the regulation and protection of Montana's water resources. I feel privileged to be able to appear before you today, and I thank you for the opportunity to present this testimony to you on the State of Montana's view concerning the Corps of Engineers' management of the Missouri River reservoirs.

Even in the best of times, Montana is a dry state. On average Montana receives only 11 to 15 inches of rainfall a year. That compares with the 39 inches of average rainfall received a year in the Washington, D.C., area. So you can see that when Montana is in a prolonged drought the thin margin we operate on is taken away. Montana is just now coming out of a drought that has lasted for several years.

In eastern Montana one bright spot in the economy has been the growth in the tourism and recreation industry. Fort Peck Reservoir can become one of the premiere walleye fisheries in the country. Unfortunately, that growth and recognition has been threatened as a result of the Corps of Engineers' management of the Missouri River reservoirs during the drought. For too long the Corps operated the Missouri River and its system of dams as if there were no drought. Operations were predicated on normal amounts of snow and rain, but year after year the snow and rain never came. Montana continued to suffer from the Corps' overly optimistic forecasts of precipitation during a severe drought.

Montana and the other upstream states gave up a lot of valuable land for dams on the Missouri River. The irrigation projects promised in return under the Pick-Sloan Plan were never constructed. The downstream states, however, benefitted immediately from the dams by having flood control and water for navigation and municipal water supplies. Those benefits have lasted to this day. But just when Montana stood ready to capitalize on recreation at Ft. Peck Reservoir, the Corps during the prolonged drought continued to drain Fort Peck. Water was taken away from a thriving $67 million recreation industry to float a $14 million industry that continues to decline. In the spring, just when the fish needed rising or steady water levels for spawning and feeding, the water level dropped. When you had to walk over one mile from a boat dock to find the edge of Fort Peck lake, it was not much consolation to hear that the barges were floating in Missouri, especially when the same goods on those barges could be shipped by truck or rail. Our only alternative in Montana was to pray for rain or demand the Corps not release so much water. Clearly, the Corps had some answering to do concerning its operations of the Missouri River reservoirs.

In light of these concerns, the Corps' present effort to review and update its Master Manual was long overdue. This review recognizes that the current Master Manual is outdated, and that new interests, values, and needs must be adequately incorporated into the Master Manual.

At first, Montana was optimistic about the Master Manual review. Montana participated from the beginning and will continue to participate in that process. Montana always took it for granted that the Corps operated under the assumption that fish and wildlife and recreation, authorized purposes of the reservoir, were considered equal to the other uses of the reservoir. So Montana was very disappointed early in the Master Manual review process to be presented with an August 1990 Corps of Engineers' legal opinion that stated fish and wildlife and recreation were "secondary uses". In short, that meant the Corps could choose to operate the reservoirs so that fish and wildlife and recreation would simply receive whatever water was left over after satisfying other uses of the reservoirs. All Montana was asking for was fair and equal consideration. We know the Corps had a difficult job running the reservoirs with all of the competing demands for the resource, but we believed the Flood Control Act of 1944 required the Corps to give equal consideration to fish and wildlife and recreation in the management of the system. This was especially true for Ft. Peck Reservoir since federal law was amended in 1986 to specifically provide and emphasize that recreation is an authorized purpose of Ft. Peck Reservoir.

When Montana, North Dakota and South Dakota found out that despite the Master Manual review that was taking place, fish, wildlife and recreation were relegated to the bottom of the priorities, we felt we were forced into the courts. What good was the Master Manual review process when the central premise was that we are only entitled to leftover waters, despite legislation to the contrary?

Montana and the Dakotas therefore in early 1991 filed a lawsuit in U.S. District

Court in Billings before Judge Shanstrom asking for fair and equal consideration of fish and wildlife and recreation in the management of the reservoirs. South Dakota, North Dakota and Montana v. Needham (filed February 4, 1991).

During that litigation our transportation expert from Iowa State University, Dr. Phillip Baumel, demonstrated that the downstream states and the barge industry had produced bogus studies inflating the importance of river transportation. He found the downstream studies' assumptions "unrealistic and naive." While one study by the University of Missouri warned of a $120 million impact if reservoir levels were increased and navigation flows decreased, Dr. Baumel found the small amount of grain carried on the Missouri River by barges "can have little or no impact on railroad grain rates." Indeed, he has shown that most benefits ascribed to the Missouri system are actually produced by the existence of the Mississippi River transportation system.

The Corps commissioned a study by the Tennessee Valley Authority (TVA) of navigation economics on the Missouri River, but refused to release the full report to the upper basin states. In April 1992 Judge Shanstrom, over the Corps' objections, ordered the entire report turned over to Montana and the Dakotas for analysis by Dr. Baumel, who found that report and another report for the Corps by the TVA to be insupportable and biased towards navigation.

It is also worth noting that during that litigation a January 1992 report was issued by the General Accounting Office (GAO) reviewing the Corps' management of the Missouri River reservoir system under drought conditions in 1988, 1989 and 1990. The GAO report found the Corps' drought contingency plan was based on assumptions that were no longer valid, and that the plan did not reflect the current economic conditions in the Missouri River Basin.

Consistent with our lawsuit, the GAO also found no appropriate legal basis for the Corps' existing operating procedures which gave recreation a lower operating priority than other authorized purposes even when that lower priority results in decreased system benefits.

As a result of that litigation the Justice Department in a March 1992 letter to the upper states admitted all authorized purposes were equal and that congressional authorization was not necessary before the Corps could change priorities in its operational scheme. That was buttressed by the July 1992 deposition of John Elmore, the Corps' highest ranking civilian, who reiterated that the foregoing statement was official Corps policy, despite anything to the contrary stated by lower Corps officials in Omaha.

Because the upper states had thus already obtained from the Corps all they sought in their lawsuit, Judge Shanstrom dismissed the lawsuit on February 3, 1993.

That was the second lawsuit in two years filed by the upper states against the Corps of Engineers. The other suit had been filed in federal court in North Dakota in

1990 seeking injunctive relief to prevent any releases which would further lower levels at the Ft. Peck, Garrison and Oahe reservoirs when it was feared that further releases from Oahe for navigation during the drought would cause irreparable harm to fish reproduction. South Dakota, North Dakota and Montana v. Hazen (filed May 4, 1990).

In that suit, although the district court found the Corps' actions to be arbitrary and capricious and issued an injunction "restraining and enjoining the [Corps] from discharging a greater volume of water from the Oahe Reservoir than that flowing into the reservoir, with the intent that the existing pool levels be maintained, until the first day of June, 1990", it was set aside in an expedited appeal to the Eighth Circuit Court of Appeals, and the entire case was ultimately dismissed as moot because the reproductive season had already passed. The court thereby avoided the issue of whether the Corps' actions were even reviewable and whether Montana, North Dakota and South Dakota had standing to sue.

We realize that it is easy to sit back and criticize the Corps, but that the tough job is to come up with an operational plan that satisfies or mostly satisfies most or all interests. That is why we have continued to participate fully in the Master Manual Review process. Beyond having all authorized purposes considered equally, we realize the various interests in the basin need to try to work out their differences and from that give the Corps guidance on what would be considered a satisfactory operating regimen.

The Corps' Master Manual Review continues with a projected completion date of 1995 for the Final EIS. Montana and the Dakotas are concerned about the navigation bias that continues to persist in this review. I was in Omaha on September 30 meeting with the Corps regarding our comments on the preliminary draft EIS. Our transportation expert from Iowa spoke for almost two hours regarding our continuing dissatisfaction with the Corps' navigation economic methodologies. Our point is that the economic importance of navigation is being overstated at the same time other Corps' studies understate the value of recreation. At this point the Corps has us coming and going. We continue to point out that if the data going into the review is flawed, what confidence can we have in the final operational scheme based upon that analysis?

Although heavy rains the past season are helping refill the Ft. Peck, Garrison and Oahe reservoirs, we must still prepare for future droughts. Montana certainly doesn't expect to keep all of the Missouri River for itself, but it does expect equal treatment from the Corps of Engineers when that river and its reservoirs are regulated, especially during a severe drought. We hope the Corps will ultimately correct its methodologies so that fish and wildlife and recreation are given equal consideration when a new Master Manual is formulated. That is really all we ask. And because that is all we ask, and because we feel what we ask is reasonable judged by any standard, that is why we do not feel unwarranted in using the court system when necessary to protect such a vital interest.

Let me conclude by saying that Montana appreciates the attention this committee is giving to one of Montana's, the regions, and the nation's most precious resources.

Thank you Mr. Chairman and members of the Committee for allowing me to testify before you on this matter of great importance to the citizens of Montana.

[Note: Attachments to this statement have been retained in committee files.]

Prepared Statement by

David A. Sprynczynatyk
North Dakota State Water Commission

DRAFT

The Committee on Environment and Public Works
United States Senate

The Honorable Max Baucus
United States Senator, Montana
Chairman

October 11, 1993
The Holiday Lodge
Glendive, Montana

Mr. Chairman and Members of the Committee. My name is David Sprynczynatyk and I serve as the State Engineer for the State of North Dakota and as Secretary to the State Water Commission.

First of all, thank you Senator Baucus and Senator Conrad for taking time to listen to our concerns on how the Army Corps of Engineers operates the Missouri River. My testimony will focus primarily on the Missouri River Master Water Control Manual and its review.

Record high precipitation and runoff this summer have ended much of the severe drought that has plagued the Missouri River basin for the past six years, but the effects of the drought linger. Unfortunately, the upper basin states have incurred a disproportionate share of the adverse impacts generated by lingering drought conditions. Especially hard hit are the three largest reservoirs: Fort Peck, Garrison, and Oahe.

Because of the low reservoir levels maintained during the drought, the upper basin states experienced substantial losses of water for authorized uses such as water supply, agriculture, recreation, hydropower generation, and fish and wildlife. Below normal rainfall and snowfall were mostly responsible for the adverse impacts, but the Corps' reservoir management decisions, which are based on the Missouri River Master Water Control Manual, had severe consequences.

The Master Water Control Manual, better known as the Master Manual, provides the general guidelines the Corps follows in its development of the Annual Operating Plan. It is apparent that rules included in the Master Manual are inappropriate during a drought. Until recently, however, it was "business as usual" for the Corps. The outdated Master Manual, last reviewed in 1979, was used by the Corps as the basis for operating the system during drought just as it had been in normal years.

In response to concerns raised over the dramatic reduction in main stem reservoir water levels, the Corps' Missouri River Division in Omaha began the comprehensive update of its Master Manual in November of 1989. The purpose of the review was to determine if the current water control plan identified in the Master Manual appropriately met the contemporary needs of the basin.

The original water control plan was selected because its use would ensure that the system would not be drawn down below the permanent pool levels during another drought similar to the one experienced in the 1930's. To put the potential drawdown in perspective, it is important to understand that under provisions of an unrevised manual, each of the big three reservoirs could be drawn down, on average, 70 feet from normal operating levels.

Basically, the Master Manual is the same document that was in place in 1960, although the contemporary uses of the river and the reservoirs have changed dramatically. In the face of these changes, which include conflicting objectives, interests, and varying hydrologic conditions, the need for an updated Master Manual became an urgent concern.

The Master Manual review consisted of a two-phase study. Phase I was a limited effort initiated in November of 1989 and completed in May 1990. Phase I focused on the economic evaluation of a number of alternative operational changes to the plan. Three operational changes were evaluated: 1) increases in the permanent pool storage, 2) changes in the navigation season length, and 3) maintenance of various minimum flow ranges when navigation was not occurring on the river. Phase I provided the impetus and justification for proceeding with a more detailed review in Phase II. Phase I supported the upstream states' belief that a revised Master Manual could provide greater economic and environmental benefits than the present Master Manual.

Phase II was initiated in July 1990 and was to be completed by December 1991. As of today, the Missouri River Basin states are anxiously waiting for Phase II final results. Repeated postponements mean that the earliest the Phase II review will be complete is 1995. Phase II identifies in more detail the hydrologic, economic, social, and environmental impacts of 307 alternatives. Phase II will determine the national economic development benefits and costs, and will provide estimates of regional economic gains and losses. Phase II will also include all environmental studies and coordination required by the National Environmental Policy Act and other environmental laws, including the preparation of an environmental impact statement (EIS). It appears that the draft EIS for the Master Manual will be circulated for public comment in March 1994.

After 3-1/2 years of work, the Corps has released an 8 volume, 5000 page, Preliminary Draft Environmental Impact Statement (PDEIS) for the Master Manual. The Corps has received more than 500 comments from federal agencies, the states, and the Indian tribes on the PDEIS. The following are several of our most important concerns that must be addressed before public release.

1. We urge the Corps to identify a preferred alternative in the Draft EIS document. It is important for the Corps to commit to choosing a preferred alternative in their release of the draft EIS to the public. This provides the public knowledge of which alternative the Corps believes provides direction for and reflects the current needs to the entire Missouri River Basin.

2. In an effort to move toward balancing the benefits, we have taken the position that the preferred alternative will need to provide a permanent pool level of no less than 44 million acre-feet. In other words, the preferred alternative be selected from the "E" series in the PDEIS.

3. Study conclusions are biased because they are compared to the existing water control plan. The water control plan is heavily weighted towards navigation and its tremendous water demands; therefore, any modification to higher permanent levels would obviously impact navigation. Instead, the Corps needs to give equal consideration to all uses by maximizing the benefits, and then determining the best mix of optimized benefits.

4. Navigation on the Mississippi River is not an authorized purpose of the Missouri River system, but we are pleased to note the results show that Missouri River operations do not impact Mississippi River navigation. Navigation on the Mississippi was curtailed only once in the fall of 1939 during the 93-year period of study.

5. The PDEIS is flawed and we feel that the Corps must modify its analysis. Also, we feel the Corps can expeditiously make the necessary changes to improve the PDEIS and more equally distribute the contemporary benefits.

In the Master Manual review process, the environmental concerns may likely dictate a preferred alternative. We believe it is apparent that virtually any change from the current Water Control Plan (baseline) would benefit the overall environmental community.

It is also apparent that the Corps will have to meet legal environmental considerations throughout the Missouri River Basin such as the Endangered Species Act and water quality standards; and should maximize the output of the natural resource categories. A primary concern is the troubled status of the coldwater fishery caused by the low lake levels. Steps must be taken to enhance reservoir coldwater habitat by obtaining higher lake elevations.

The North Dakota State Department of Health and Consolidated Laboratories is concerned that any proposed operating plan be in compliance with the North Dakota Water Quality Standards and the Federal Clean Water Act. Information obtained from the department indicates that if the level of Lake Sakakawea is lowered below 1830 msl during the summer stratification period of June through August, state standards could be violated. Dissolved oxygen levels of less than the state standard of 5.0 mg/l have been detected.

The last point I would like to make is that the preliminary results show that it is possible to regulate the main stem reservoirs in such a manner to have significantly higher lake levels while still meeting all downstream water requirements. In fact, higher reservoir levels actually provide additional security for both upstream and downstream water users during periods of extreme drought.

In closing, we are asking for fairness and equity and will insist that the Corps modify its analysis. We feel the Corps can expeditiously make the necessary changes to improve the PDEIS and more equally distribute the contemporary benefits.

NORTH DAKOTA
STATE DEPARTMENT OF HEALTH
AND CONSOLIDATED LABORATORIES

ENVIRONMENTAL HEALTH SECTION

1200 Missouri Avenue
P O Box 5520
Bismarck, North Dakota 58502-5520
Fax #701-221-5200

May 21, 1993

Colonel John Schaufelberger
Missouri River Division Engineer
U.S. Army Corps of Engineers
Box 103, Downtown Station
Omaha, NE 68101

Dear Colonel Schaufelberger:

The North Dakota Department of Health and Consolidated Laboratories is the agency in North Dakota responsible for the development and implementation of state water quality standards. The Department has developed state water quality standards which have been approved by EPA Region VIII.

The Department conducts water quality monitoring to determine compliance with the water quality standards and to identify potential problems that may impact water quality. As part of that effort, the Department conducted extensive water quality monitoring on Lake Sakakawea during 1992. The results of the monitoring indicate that the lake experiences thermal stratification that begins in early June and gets stronger and deeper through July and August exhibiting the strongest stratification in mid-August. Fall overturn occurred in early September, and by September 11, 1992 the lake was completely mixed at all sites monitored.

At the site nearest the face of the dam, dissolved oxygen concentrations were at or near saturation through June and early July. Beginning in mid-July hypolimnetic dissolved oxygen began declining. Concentrations reached their lowest level of 6 mg/L near the bottom on August 24 and September 1.

A similar pattern was observed at the other sites with hypolimnetic dissolved oxygen concentrations declining through July and August. However, at each consecutive upstream site hypolimnetic dissolved oxygen declined reaching its lowest level of less than 4 mg/L near Independence Point. Our state water quality standard is 5.0 mg/L for dissolved oxygen.

The Department is concerned with these low levels of dissolved oxygen in the hypolimnion and the aerial extent and lack of depth of the hypolimnion in recent years. Our data indicated that in mid-August the thermocline was observed at 28-30 meters over 43 meters near the face of the dam, at 28-30 meters over 35-38 meters in the middle of the lake and at 20-22 meters over 26-28 meters near Independence Point. During this same time period, water temperatures in the hypolimnion ranged from 12 - 17.5°C.

The Department believes the cold water fishery in Lake Sakakawea avoided any significant impact in 1992 because of the cool summer temperatures. If normal or above normal summer temperatures occur this year, there exists a potential for a die-off of the cold water species of fish, which includes rainbow smelt, rainbow and brown trout and chinook salmon. This results from the reduced size of the hypolimnion which is directly related to summer temperatures and volume of the reservoir. The hypolimnion provides the preferred temperature for cold water species, and thus, is the primary habitat for the smelt, trout and salmon.

This Department requests that the Corps of Engineers maintain the level of Lake Sakakawea at a level of 1,830 ft msl or higher to reduce the possibility of violating our state water quality standards or causing a fish kill.

This Department has just received a copy of the preliminary draft Environmental Impact Statement for the Missouri River Master Water Control Manual. Further comments will be provided on the draft statement after our review is completed.

If you need any additional information, please feel free to contact this Department.

Sincerely,

Francis J. Schwindt, Chief
Environmental Health Section

FJS:cc
cc: Governor Schafer
Colonel Stewart Bornhoft

U.S. ARMY ENGINEER DIVISION, MISSOURI RIVER
CORPS OF ENGINEERS
P.O. Box 103, Downtown Station
Omaha, Nebraska 68101

JUN 18 1993

Reservoir Control Center

Mr. Francis J. Schwindt, Chief
Environmental Health Section
North Dakota State Department of
Health and Consolidated Laboratories
P.O. Box 5520
Bismarck, North Dakota 58502-5520

Dear Mr. Schwindt:

Thank you for your May 21 letter concerning your request that we maintain Lake Sakakawea at or above elevation 1830 feet mean sea level (msl). As you are aware, Dave Sprynczynatyk, State Engineer, coordinated with your Department, with the Game and Fish Department, and with river users before recommending that we reduce the release from Garrison Dam to 16,000 cubic feet per second (cfs) from the 17,500 cfs release that was planned.

The 17,500 cfs release would have been a near record summer low. Lower summer releases have been made only during downstream flooding events.

I understand your desire to maintain Lake Sakakawea above elevation 1830 due to the effects of elevation on water quality. The current pool is at elevation 1825.9 which continues to rise due to the ongoing mountain snowmelt and some recent badly needed rain. The reservoir dropped to a low of 1817 this winter and the minimum level during this 7-year drought was 1815 feet msl in May 1991. The minimum operating level at Lake Sakakawea is 1775 which could be reached if we were to experience a drought as severe as the 12-year drought of the 1930's.

Water quality in all the main stem lakes is always a concern. The low dissolved oxygen (DO) levels in the upper reach of the Lake Sakakawea hypolimnion were also observed by the Omaha District in a 1980-1981 study of hypolimnetic oxygen depletion. This study showed that the rate of oxygen depletion increases in the upstream reservoir direction, and that the depletion was in part a function of hypolimnetic volume. Additional information regarding the 1980-1981 hypolimnetic oxygen depletion study may be obtained from Dr. John Andersen (402) 221-4622.

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STATE WATER COMMISSION
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The low DO levels observed as part of the ongoing water quality monitoring are not uncommon occurrences on Lake Sakakawea. The observed values were measured in close proximity to the sediment-water interface where low DO values are often the norm rather than the exception. Further, the upper end of the hypolimnion was located in the vicinity of Independence Point, an area where the hypolimnetic volume is small. Hypolimnetic oxygen depletion is a function of volume, with the DO in the small volumes at the upper end of the hypolimnion being depleted quickly. Available 1992-1993 data from the ongoing North Dakota, Corps of Engineers, USGS, and Affiliated Tribes Coordinated Water Quality Monitoring Effort, cited in your letter, indicate that the hypolimnion was approximately 1.2 meters thick in the Independence Point area during August 1992. Such a small volume would be quickly depleted of oxygen. The area which may experience hypolimnetic oxygen depletion will shift up and down the reservoir in response to pool elevation changes, as the location of the "small volume hypolimnion" shifts. In summary, we believe the observed oxygen depletion levels can occur during any given year irrespective of reservoir levels.

I hope this addresses your concerns. Even though we are unable to quickly return the lake to elevation 1830, the recent reduction in discharge will result in an additional 1.2 feet of water by the end of August. Although this is not a major improvement, it is a step in the right direction. Current weather patterns are encouraging. Maybe we will see an end to the drought and the lakes and rivers can return to more normal levels. We would all welcome that change.

If you have further questions, feel free to contact me or Duane Sveum, Chief of the Reservoir Control Center. His telephone number is (402) 221-7347.

Sincerely,

/S/ John E. Schaufelberger

John E. Schaufelberger
Colonel, Corps of Engineers
Division Engineer

Copy Furnished:
/Dave Sprynczynatyk, State Engineer, ND

STATE WATER COMMISSION
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NORTH DAKOTA
STATE DEPARTMENT OF HEALTH
AND CONSOLIDATED LABORATORIES

ENVIRONMENTAL HEALTH SECTION

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Fax #701-221-5200

October 11, 1993

Honorable Max Baucus
Senate Environment and
Public Works Committee
511 Hart Office Bldg.
Washington, DC 20510

Dear Senator Baucus:

We are unable to attend the oversight hearing on the Missouri River Master Control Manual in Glendive, Montana, on October 11, 1993. However, the state of North Dakota will provide comments at the hearing, and have had input to that testimony.

We are the water quality regulatory agency for the state of North Dakota and therefore have the responsibility of ensuring federal actions are in compliance with state water quality standards and pertinent sections of the Clean Water Act.

I would like to take this opportunity to provide specific comments to the official record which focuses on a few very important issues among the myriad of water quality issues surrounding the Master Water Control Manual.

A major request of ours is that the revised Master Manual stipulate a minimum elevation for Lake Sakakawea of 1830 msl from June through August. This is a critical period when the lake is thermally stratified. We must ensure that sufficient volume in the hypolimnion is available for the cold water fishery assemblage of smelt, salmon, and trout. Dissolved oxygen concentrations of less than 5 mg/l, and temperatures near the upper threshold for salmonoid survival, have been observed when the lake has been below 1830 msl during the summer period. This Department conducts water quality monitoring efforts on Lake Sakakawea, and during 1992, low dissolved oxygen levels below our state standard were observed at Independence Point. At a monitoring site nearest the face of dam, dissolved oxygen concentrations were at or near saturation through June and early July. Beginning in mid July, hypolimnetic dissolved oxygen began declining. A similar pattern was observed at other sites, with the hypolimnetic dissolved oxygen concentrations declining through July and August. However, at each consecutive upstream site, hypolimnetic dissolved oxygen declined, reaching its lowest level of less than 4 mg/l near Independence Point. Our Department is concerned that these low levels of dissolved oxygen in the hypolimnion, as well as the aerial extent and lack of depth of the hypolimnion in recent years, could have resulted in fish mortality. This Department believes the cold water fishery in Lake Sakakawea avoided any significant impact in 1992 because of the cool summer temperatures. Significant improvements in dissolved oxygen concentrations were observed this past

summer. These empirical data confirm that lake levels greater than 1830 msl are necessary to be in compliance with state water quality standards and protection of aquatic biota.

Lake Sakakawea and the Missouri River system is also a major source for municipal water supply, and indications are that the demand for this source of water will increase dramatically in the future. It is imperative that the best possible raw source for potable water be maintained or improved. It is our belief, subject to confirmation with continued monitoring, that lake elevations above 1830 msl will result in lower concentrations of heavy metals resulting in an enhanced probability of meeting human health criteria delineated in the state water quality standards.

Thank you again for this opportunity to provide testimony, and we urge your serious consideration of the contemporary water quality issues of the upper basin states, and that compliance with existing Clean Water Act criteria should play an overriding role in the revision process. Should you have any questions, please contact me at (701) 221-5215.

Sincerely,

Dennis R. Fewless
Director
Division of Water Quality

MS/raa
cc: Senator Kent Conrad
Senator Byron Dorgan
Representative Earl Pomeroy

Prepared Statement by

Robert E. Roberts, Secretary
South Dakota Department of Environment
and Natural Resources

to

The Committee on Environment and Public Works
United States Senate

The Honorable Max Baucus
United States Senator, Montana
Chairman

October 11, 1993
The Holiday Lodge
Glendive, Montana

The Department of Environment and Natural Resources
Protecting South Dakota's Tomorrow ... Today

Mr Chairman and members of the committee: my name is Robbie Roberts, and I am the Secretary of the South Dakota Department of Environment and Natural Resources. I want to thank you for the opportunity to testify regarding the management of the Missouri River.

While outlining the history of the current management system, I want to make four arguments for you. First, management of the river has not been consistent with the intention of Pick-Sloan. Second, management of the river has not complied with the O'Mahoney - Milliken Amendment. Third, current management of the river does not make economic sense. And fourth, current management of the river does not make environmental sense.

My first job today is to briefly summarize the history of the management of the river. The first claims on the waters of the Missouri River were for navigation. In 1832, a federal program to remove snags from the Missouri River was commenced. In 1935, Congress approved the Fort Peck Dam in Montana. Fort Peck was constructed to provide 20,000 cubic feet of water per second for navigation for a channel six feet deep and 200 feet wide from Sioux City to Kansas City. Claims on the Missouri River by navigation interests crystallized again in 1944 in HR 3961 - The Rivers and harbors Bill. That bill called for a navigation channel nine feet deep and 300 feet wide on the Missouri River below Sioux City. Upstream congressmen saw this proposal as a real threat to any water development for consumptive purposes.

At the same time the Rivers and Harbors Bill was being considered, the Flood Control Bill of 1944 was being considered. The overriding purpose of this bill was to control flooding and to deal with the navigation threat. Serious flooding had occurred on the Missouri River since settlement. Other motives behind the Act were a means of creating jobs for returning World War II soldiers and upstream irrigation development. These conflicting objectives were embodied in two rival plans, the Pick Plan, developed by the Corps of Engineers, and the Sloan Plan, developed by the Bureau of Reclamation. Rather than compromise, the two approaches were simply combined - a shotgun wedding, if you will - taking five new main stem dams, plus the existing Fort Peck Dam, from the Pick Plan - and the vast federally financed upstream irrigation projects from the Sloan Plan. Pick-Sloan provided multiple uses of water including flood control, irrigation, navigation, hydro-electric power and other uses.

Mr Chairman, only 3% of the irrigation projects promised by Pick-Sloan were ever completed in my state. We did benefit from the flood control and, to some degree, from cheap rates for electricity. But the economic development for which we traded 520,000 acres of farm land - mostly prime, river bottom farm land - did not materialize.

I conclude, Mr Chairman, that management of the river has not been consistent with the intention of Pick-Sloan.

Second, management of the river has not complied with the requirements of the O'Mahoney-Milliken Amendment.

The Rivers and Harbors Bill which was pending in the 1940's was intended to created a channel nine feet deep and 300 feet wide below Sioux City for navigation purposes. Some experts had said that such a channel would use all the available Missouri River water for navigation leaving no water for the vast irrigation projects.

The challenge of the Rivers and Harbors Bill was ultimately dealt with by the O'Mahoney-Milliken amendment which was added not only to the Flood Control Act of 1944 but also to the River and Harbors Act as adopted in 1945. The amendment provided that water captured by the reservoirs could be used for navigation only if it did not conflict with uses of water for "domestic, municipal, stockwater, irrigation, mining or industrial purposes." In other words, the amendment provided that upstream consumptive uses were absolutely protected against navigation interests. As things have developed, however, upstream consumptive uses have not been as important as the emerging upstream nonconsumptive uses such as the use of water for fish and wildlife and recreation.

It was pointed out during the debates of the Flood Control Act of 1944 that reservoir evaporation was a consumptive use when storing water for the production of electric power and for use in irrigation. So one can surmise that evaporation losses caused by storing water for fish and wildlife are a consumptive use. The general consensus, during the debates, was that the O'Mahoney-Milliken amendment subordinated navigation to other uses.

Thus, Mr Chairman, my second conclusion is clear: management of the river has not complied with the requirements of the O'Mahoney-Milliken Amendment.

Third, Mr Chairman, current management of the Missouri River system does not make economic sense. Historically, the downstream states have argued the importance of the navigation industry within their states. But the relative value of those navigation interests has been made clear in the January 1992 report by the GAO entitled, Water Resources, Corps' Management of Ongoing Drought in the Missouri River Basin. Here is GAO's conclusion about the relative importance of navigation versus other interests:

> Some assumptions made in 1944 are no longer valid. For example, the Corps estimated that 12 million tons of goods would be commercially transported on the river annually. The commercial transportation of goods peaked in 1977 at only 28 percent of this amount, or about 3.3 million tons; and, as of 1988, had declined further to 2.2 million tons. ... In addition, other impacts were not anticipated, such as the impact of recreation on the reservoirs in terms of the

> revenues recreation industries could provide for North Dakota, South Dakota and Montana. Added together, ... the reservoirs supported spending of about $65 million by visitors in 1988. This compares to estimated 1988 gross revenues for barge companies of about $17 million. (p. 29-30)

Two weeks ago in Omaha, Colonel Schaufelberger, who is here to testify today, briefed some of the options that the Corps is considering as it develops a new Master Manual. The maximum economic value being used by the Corps for navigation is $17 million; the maximum economic value for recreation, counting only direct spending, is $50 million. In other words, without using an economic multiplier to measure the total value of the recreation industry, it is already about 300% of the barge industry.

Now, let me make this very clear, the Corps is not predicting those amounts for each industry; they have simply adopted, for planning purposes, the figures that exist. In other words, this is so clear an economic disparity that it isn't even controversial anymore.

As the economic arguments have grown more sophisticated, my friends in the downstream states have stopped talking about the total value of the navigation industry, and have started talking about "water induced transportation rates." I am not an economist, but I understand that phrase to mean that the very existence of the barge industry serves to keep down prices, primarily rail rates. And yet, as one witness in Omaha made clear, the amount of grain moved on the Missouri River in a recent year was equal to the total production of an average two counties in the Midwest.

As the economic arguments have grown weaker, Mr Chairman, the political arguments have grown stronger. The latest approach of the downstream states is to begin to argue that the real reason for managing the Missouri River and placing their interests first is the impact that the Missouri River has on the Mississippi River. But, Mr Chairman, navigation on the Mississippi River is not an authorized project purpose of the Missouri River system.

From my state, this growing interest in impacts on the Mississippi River looks like a political attempt to expand the discussion to an area where the arguments are weak, but votes in Congress might be plentiful.

I conclude, Mr Chairman, that current management of the river does not make economic sense.

Finally, Mr Chairman, current management of the river does not make environmental sense. The system has been operated with environmental benefits considered as a secondary purpose at best. For instance, the current operating plan has contributed to the loss of endangered species habitat and will not achieve the goal of

least tern and piping plover restoration. The Corps of Engineers must develop a management plan that will put all authorized purposes on an equal basis. Such a change could help the economic return from the system as well in areas such as improving management practices that relate to the reservoir fishery.

Environmental issues will be the driving force in the future management of water resource projects. The United States Congress has demonstrated this by passage of Public Law 102-575, Reclamation Projects Authorization and Adjustment Act of 1992. This Act establishes fish, wildlife, and recreation requirements for the Central Utah Project and the Central Valley Project in California.

I conclude, Mr Chairman, that current management of the river does not make environmental sense.

In conclusion, Mr Chairman, the economic development benefits promised the upper basin states by the Pick-Sloan plan never happened; the protection of upstream rights promised by the O'Mahoney-Milliken Amendment has not occurred; and current management of the river does not make economic or environmental sense.

The Master Manual Review offers an opportunity to solve all four of these problems; I hope we take full advantage of it.

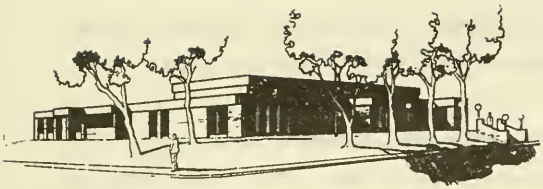
I introduce for the record the following items:

"My View of the Missouri River", an article in the South Dakota Law Review, by the late George S. Mickelson, then the Governor of South Dakota.

"The Law of the Missouri," an article in the South Dakota Law Review, by John P. Guhin, Assistant Attorney General of the State of South Dakota.

And the report of the United States General Accounting Office, entitled "Water Resources; Corps' Management of Ongoing Drought in the Missouri River Basin."

Thank you very much for this opportunity; I hope this information will prove valuable to you.



Valley County
501 Court Square
Glasgow, Montana 59230
Phone: (406) 228-8221
FAX: (406) 228-9027

TESTIMONY PRESENTED BY GENE C. REIMCHE
MEMBER OF VALLEY COUNTY COMMISSIONERS
GLASGOW, MONTANA 59230

To: The Senate Committee on Environment and Public Works
October 11, 1993

Chairman and Members of the Committee, I am Gene Reimche, Member of the Board of County Commissioners. I want to thank you for the invitation to testify on the Missouri River, Fort Peck Lake Projects and Lake Levels.

I would like to touch on three items: (1) Roads, (2) Breakwater, and (3) Lake Level.

(1) Roads. Valley County has worked in joint with the Army Corps of Engineers on road projects in the Fort Peck area. We are pleased to have the most recent projects completed:

a. Approximately one mile paved on a county road to the Duck Creek area, of which the county's cost was approximately $41,000.

b. The road to the Fort Peck Marina.

c. The Fort Peck Marina parking lot and the shop area.

These will be big attractions for events such as the Governor's Cup Walleye Tournament and other activities.

Senator Baucus and Committee members, we want to thank you for the part you played in raising the funding for these projects.

(2) Breakwater. Fort Peck Lake borders six counties with about 1,520 miles of shoreline at full pool. It is considered by some professional fishermen to be the premier walleye fishery in the U. S. Imagine the economic impact of properly managing a fishery of this magnitude. If water levels and releases were to be kept at an acceptable level to improve fish habitat, boat access and increased fishable acreage, the Upper Missouri River Basin states could realize considerable immediate growth of that $65 million annual recreation figure. There are many stages in the development of the Lake. For example:

- In the early 80's, a Program for Fisheries was formulated.
- Wildlife Management has been developed and now plays a big part on and adjacent to the Lake property.
- The building of the Breakwater is needed now to continue development.

What the Breakwater will do:

1. Provide an adequate safe harbor;
2. It is the key element for development of tourism in Eastern Montana;
3. Increase recreation benefits on the local, regional and national levels;
4. Increase interest in wildlife, fishing and camping.

At a time when Eastern Montana's economy is in need of a BOOST, the Breakwater would be the critical component for long-term benefits. It would give security to the private investor who is willing to be a pioneer in the resort and recreation business for the life of the lake.

The priorities of our society have changed since 1933 when Fort Peck was on the drawing board. The Lake is surrounded by the 1.1 million acre Charles M. Russell Wildlife Refuge. The Lake and the Charles M. Russell Wildlife Refuse are outdoor recreation attractions of national significance.

The hour has arrived to INVEST IN NORTHEAST MONTANA. Without the Breakwater, economic expansion in developing recreational facilities will not happen.

A Breakwater at the northwest end of Fort Peck Lake can be considered as the FOUNDATION FOR THE FUTURE.

Chairman and Committee members, all of the people of Montana are in the "Fort Peck Breakwater Project" boat. Let's not let it sink!

(3) Lake Level. It is difficult to gather numbers pertaining to the impact of the low water levels. One example -- you have areas such as the Crooked Creek Marina that has no water at the lower levels to launch boats or to install docks. This type of situation puts the Marina owner out of business. When that

happens, it is reflected back to the county.

The Corps of Engineers needs to go on record showing that water levels at Fort Peck Lake are critical to recreation and economic opportunities. The Corps needs to define alternatives when there isn't adequate water levels. We want improved management of the river and the lake; the present water management plan discourages recreation. The Corps needs to provide a plan for long-term strategies to protect water resources, specifically in the upper-basin states.

I want to conclude on a personal note. Fort Peck Lake isn't just another lake on the Missouri River system. It is a natural resource for Montana ... a treasure to those of us in Eastern Montana. It is unique and beautiful each time we experience it; but it is also worth enhancing, protecting and fighting for!

Respectfully submitted,

Gene C. Reimche

Gene C. Reimche, Member
Board of County Commissioners

Testimony Presented by Diane Brandt
Sam's Supper Club
Glasgow, Montana 59230

To: The Senate Committee on Environment and Public Works
October 11, 1993

Mr. Chairman and Members of the Committee, I am Diane Brandt, co-owner of Sam's Supper Club for the past 15 years. I serve on the Fort Peck Advisory Council, Montana's State Tourism Advisory Council (which is responsible for advising the Governor on tourism matters, marketing the state, approving projects for travel research and oversee the distribution of the states 4% accommodations tax), and serve on the board of Missouri River Country (the eight county region responsible for marketing and developing the area around Fort Peck Lake). I would like to address two areas regarding Fort Peck Lake in my testimony:

1.) The economic effects of the drawdowns of the Missouri River on regional and area business.
2.) The U. S. Army Corps of Engineers recreation management of Fort Peck Reservoir.

Tourism in Montana is increasingly being recognized as a tool in which to strengthen our economy. Estimated nonresident travel expenditures to Montana in 1992 (from the Institute of Tourism and Recreation Research at the University of Montana) are: Total expenditures: $900 million, bringing the total economic impact to over 2 billion. The number of visitors, providing this impact is in excess of 6.5 million and supports 32,000 jobs. These numbers are impressive, but most of those expenditures were in western Montana, and the more heavily populated areas of the state. A 1992 report by the institute reveals that Montanans' attitudes towards tourism development lists advantages as:

1.) Employment opportunities
2.) A more active local economy
3.) More or better parks or recreation.

The disadvantages listed were:

1.) Crowded recreation areas
2.) Traffic congestion
3.) Higher prices for goods and services

Travel Montana's 5-year strategic marketing plan (July 1993-June 1998) has identified that more marketing and development needs to be done in the states less traveled areas. All of this leads us to one conclusion that eastern Montana and specifically the Fort Peck Reservoir is ripe for economic and recreational opportunities.

It's difficult to gather numbers pertaining to the impact of the low water levels at the reservoir, so I am going to share my views as a lifelong resident of the county and businesswoman for 15 years. The reason I got involved in the tourism business was that I could see the profits increase at the restaurant during the summer months. While I recognize the importance of our local customers, they are the ones responsible for paying the utility bills and making the payroll. It is the tourism dollars that

provide revenue to survive during the slow cold winter months. Rural Eastern Montana has suffered significant loss of population during the last ten years. Combined with the effects of the long drought, it's a wonder that so many businesses have survived. Unfortunately, too many people have left, and too many businesses have closed; gas stations, construction workers, motels torn down, and the ones that remain can many times barely get by without the help of their local banker! Businesses surrounding the lake have had a pay the bills only exixtence, little or no profit. The historic Fort Peck Hotel has been closed for more than a year, the grocery store has been closed for several years and Crooked Creek Marina has been totally shut down. With poor roads, there has been minimal access to Rock Creek recreation area, Hell Creek has had no potable water, Fort Peck West Marina has not been able to sell gas, use the main boat ramp or carry sufficient inventory to satisfy the customers.

The persistent negative press about the low and inconsistent water levels at the reservoir have led the public to believe that there is no access to the water, that there is no water, and that there are no services to support the user. How can there be opportunities for new money or new growth in the community without the customer? The economic economy affects of the drawdowns to the Glasgow area are devastating to many individuals and businesses!

There can be no economic benefits from recreation in the upper basin states if there is no recreation management by the Corps. In dismissing the lawsuit filed by Montana, North Dakota and South Dakota against the Corps, U. S. District Judge Shanstrom said the federal agency has agreed to the states demand that recreation needs in upstream reservoirs be given equal consideration with navigational needs of downstream states. The Corps agreed not only to treat all water needs equally, it acknowledged congressional approval is not needed to change the policy, he noted. "By admitting that, they in essence admitted the truth of our pleadings" Racicot said. "The Corps has agreed that recreation and other uses must be part of their management strategy. This however is not the case. Since the lawsuit was dismissed, the Corps has gone back to business as usual. A memorandum of understanding between the Corps, BLM, and the Montana Department of Fish Wildlife and Parks to install a potable water system at Hell Creek Recreation area was lost in a pile of papers somewhere between Omaha and Washington, D.C. Monies budgeted for FY93 road and facilities at Fort Peck West were immediately reprioritized, making it unavailable for 1993. Through the efforts of Senator Baucus, the money was reprioritized and the project was recently completed. The Fort Peck Master Plan was revised and approved in April of 1992. It provides infrastructure development, high and low visitation areas, recreation activities and needs, lake operation, watchable wildlife, public involvement and coordination with other agencies, wildlife conservation, historic properties, fishing and much more. The plan provides direction for project development and use. I have yet to see the Corps take this document seriously. The Corps National Policy on Water Management and Recreation Development continually makes it clear by their actions that they do not take management seriously.

As the nation's second largest provider of outdoor recreation, the Corps in Washington, D.C., needs to take responsibility for the overall management for the natural resources that they oversee.

I would like to point out that my community has a very positive and progressive relationship with our current Fort Peck Lake manager.

The Missouri River Reservoirs, recreationists, small business, local communities, and the States have suffered overwhelming economic losses because of no water or recreation management by the Corps over the past 50 years.

The time for change has come! How can that be accomplished? I would offer this solution:· The people in charge of water and recreation management in the Corps office in Washington, D.C. need to be replaced. The new management team should be able to follow their own plan, they should have a vision for future development, yet an appreciation for the unspoiled natural environment, they should have an understanding of the local people and their love of the land. They need to realize that this beautiful land belongs to all of us. It is a natural resource not only for Montana, but the entire country. For any development, management, or opportunities to occur at Fort Peck Reservoir, we must work together cooperatively with common goals. I thank you for your time, and invite you to come experience this unspoiled beautiful body of water--Fort Peck Lake.

Diane Brandt

Diane Brandt

October 4, 1993

Senator Max Baucus
Chairman
Committee on Environment and Public Works
Washington, DC 20510-6175

Dear Senator Baucus:

Thank you for your invitation of September 27th, requesting that I take part, in the oversight hearing on the Missouri River Master Water Control Manual. I understand that your committee has scheduled this hearing in Glendive, Montana, on October 11th. I have made the necessary arrangements to attend this important hearing.

At this time I do not intend to present any written testimony to the committee other than the concerns which I will address with this correspondence. As you are no doubt aware, the Army Corps of Engineers, has always considered recreation a secondary purpose for the existence of the Fort Peck Lake. The original and primary purposes include, the improvement of navigation from Sioux City, Iowa to the mouth of the Missouri River, flood control and the generation of hydropower.

Whatever steps the Corp is inclined to take to minimize the negative effect drawdowns have on the local fisheries, must be measured against the fact, that it will be Mother Nature who dictates their success or failure. I believe that nothing good can happen for the future of our fisheries until recreational purposes are placed at a higher priority. That is not to say that the original purposes of navigation, flood control and generation of hydropower should be abandoned. They should be measured along with the needs of recreation and not occur totally at the expense of the recreational opportunities Fort Peck Lake offers for the future.

Should the Corp be permitted to continue to operate the Lake in such a manner as to hold recreation as a secondary purpose, then I believe that more efforts should be made to ensure recreational access regardless of the level of the Lake. Rather then spending money developing 18 separate

access points, the money would be better spent developing 6 quality access points. Rather then spending money administering the cottage leases of Fort Peck Lake, these lots should be sold to the leaseholders, thus freeing up the money and manpower necessary to work on solving the problems associated with the negative impacts of the Lake drawdowns.

I believe that the Lake drawdowns would have far less impact on the local economy if the issues of quality access and replacement of lost spawning habitat and/or the replacement of the fish were more adequately addressed by the Corp.

These are the concerns which I have in regards to the Missouri River Master Water Control Manual and which I intend to discuss at the hearing. I am including with this letter the information you have requested regarding my professional biography. Should you have any questions regarding this letter or my testimony please feel free to call me at 228-4230. Again, thank you for your invitation and this opportunity to be heard.

Sincerely,

John E. Lamb
Executive Director
Walleyes Unlimited of Montana

UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
FIELD HEARING

GLENDIVE, MONTANA
OCTOBER 11, 1993

THE HONORABLE MAX BAUCUS, CHAIRMAN

"STATUS OF THE MISSOURI RIVER MASTER WATER CONTROL MANUAL REVIEW AS IT AFFECTS THE STANDING ROCK SIOUX TRIBE"

REVISED (OCTOBER 18, 1993)

HONORABLE JESSE TAKEN ALIVE, CHAIRMAN
STANDING ROCK SIOUX TRIBE

Chairman Buacus:

The Standing Rock Sioux Tribe is extremely pleased to be invited to present testimony before the Senate Committee on Environment and Public Works on "WHETHER THE MISSOURI RIVER MASTER WATER CONTROL MANUAL REVISIONS CONSIDERED IN THE INTERESTS OF THE STANDING ROCK SIOUX TRIBE".

Originally, the Standing Rock Sioux Tribe requested an oversight field hearing coordinated between your Committee and Senator Inouye's Committee on Indian Affairs to jointly address our concerns. Consequently we are asking you to include Chairman Inouye's Committee and staff at this hearing if possible. We thank Senator Conrad for being at this hearing and look forward to an eventual joint hearing with the Senate Indian Affairs Committee.

I am sure that you understand that the relationship of our sovereign nation with the Federal Government is a "nation to nation" relationship based upon our treaties which are the supreme law of the land. Accordingly, we respectfully take exception our exclusion from panel #1 with the United States General Accounting Office and Corps of Engineers, and the states of Montana, South Dakota and North Dakota. Instead the Indian nations were placed on panel #3 with a fishing club and private marina. As a sovereign nation Standing Rock Sioux Tribe resides on 2.3 million acres of land in North and South Dakota along 100 miles of Missouri River-Lake Oahe shoreline.

Mr. Chairman, as you may have read our July 7, 1993 comments to Senator Inouye previously provided for your review, this is a matter of utmost importance to the Standing Rock Sioux Tribe and, of course, to the other Tribes of the Missouri River Basin. I believe the Indian Nations are not at a point where the history of federal policy regarding our water rights in the Missouri River, it tributaries and the aquifers in the Basin must be

revised in order to preserve our water rights, and hence, our permanent Tribal homelands.

Water is sacred to us. Mni Wiconi, in fact, means "water of life". However, the average life expectancy of an American Indian male is only 43 years. We view water as a paramount resource, the successful development of which plays a key role in addressing the multitude of pressing health care issues effecting our Tribe including serious diabetes and kidney diseases, together with education, housing and other social issues. We seek to develop these water rights, as guaranteed by treaties to assure a healthy, prosperous and permanent homeland for ourselves and our children now and in the future.

The Winters Doctrine was recognized by the United State Supreme Court in 1908, and upholds reserved water rights for the development of permanent homelands for the Tribes on their Reservations. The Winters Doctrine was recently upheld by the United State Supreme Court. A thorough discussion of our Winter's Doctrine water rights appears in our July 7, 1993 comments to Senator Inouye.

In improving and maintaining our homeland's economy, Standing Rock Sioux Tribe has and will make use of water for a wide variety of both consumptive as well as non-consumptive purposes. These purposes include priceless religious, cultural, and environmental water uses(including restoration of injured sources) as well as irrigation, domestic and power production which are more traditionally measured in monetary terms. Our rights also include a great deal of flexibility in their enjoyment so as to enable us to change, sell or lease water from time to time as conditions warrant. Our water entitlement also include rights to equitable participation in the present and prior benefits of certain on-reservation and off-reservation, water-related projects.

The Standing Rock Sioux Tribe, along with other Indian Nations in the upper Missouri River Basin, have substantial water rights to the Missouri River. The Unites States Army Corps of Engineers (ACOE) manages the Missouri River, and in doing so is not giving consideration to the instream and consumptive water needs of the Tribes. The ACOE recently released a Preliminary Draft Environmental Impact Statement (PDEIS) on Missouri River operations, and of the 307 alternatives for operations there is no consideration of the rights of the Tribes. The process of consideration of alternative management schemes is proceeding without inclusion of the need to provide stored water to the Standing Rock Sioux Tribe and the region's other Tribes.

The ACOE's flawed review process seems to have been maintained independently of the congressional mandate imposed on the President by the western Water Policy Review Act of 1992 ("Review Act"). As you know, the Review Act notes that the competing demands of no fewer than fourteen federal agencies adversely

affect the efficient handling of water policy which must incorporate planning for all competing federal, state and local interests as well as the Indian Tribes. It concerns us that the Review Act further mandates that "..at least one representative chosen from a list submitted by Tribal governments located in the Western States...," but an appointment may already have occurred. The Review Act requires that a comprehensive analysis be made and reported on with three years. The Corp's current process can only impair the realization of this mandate.

We are seriously concerned that the ACOE's continued institutional policy of studied ignorance regarding Indian water rights will bring about 1) the difficulty or impossibility on the part of the Standing Rock Sioux Tribe in quickly and efficiently securing the full benefits of its extensive water entitlement; 2) the difficulty or impossibility on the part of non-Indian interest in properly preparing for the certain changes in water management and use which assertion and exercise of Indian water rights will cause; and 3) the necessity for the ACOE to revisit all of its prior actions because of its failure to consider the impact of the Master Manual Review Process of the Western Water Policy Review Act.

The Standing Rock Sioux Tribe is subject to drastic water level fluctuations affecting access, municipal and irrigation water intakes, livestock, and shoreline development without compensation for hydropower, navigation, and endangered species protection usage of Indian water. Additionally, we believe the Army Corps of Engineers must be made to account for the many graves and cemeteries which were flooded by the Oahe Reservoir. The enactment of the Native American Graves Protection and Repatriation Act is a step in the right direction. A North Dakota tribal reinternment agreement was signed on October 5, 1993.

The hydropower benefits from the Missouri River Basin have been utilized to substantially repay the Federal Treasury for the development of the Dam system. The Missouri and Mississippi River navigation industry prospers along with other downstream users along with the recreation industry in the upstream states while the Indian Nations remain among the poorest people in the United States. We believe that Pick-Sloan hydropower revenue may be a source of compensation for the sacrifices the Indian Nations have suffered in the disruption of their lives. Since the construction of the dams reservation economies have stagnated. For example, Tribes have historically relied on the use of agriculture related businesses. These have been affected by the loss of irrigable lands, prime pasture, hay fields and natural winter protection for livestock.

Understanding our dilemma, we are urging your assistance in scheduling a meeting with the President and his staff to address the Federal policy on Indian Water Rights as it affects the Standing Rock Sioux Tribe.

The ACOE perpetuates the dilemma by refusing to acknowledge Indian Water rights, and non-Indians continue to develop unused Indian water. Congressional oversights such as this are necessary for Indian Nations to present Indian Water Rights concerns to the appropriate Congressional Committees. Institutional management structures are necessary to protect Indian water rights and keep Indian people from being planned out of existence.

In closing, Mr Chairman, please understand that the Standing Rock Sioux Tribe is not contemplating any negotiation nor quantifying of its precious water rights now or in the future. I would appreciate if you would include in the Hearing Record the document dated July 7, 1993 prepared by the Standing Rock Sioux Tribe in response to the request of Senator Daniel K.Inouye, Chairman of the Senate Committee on Indian Affairs for comments on the Master Manual of the Missouri River operations.

Thank you for your time and if you have any question, I have my staff present to respond as necessary. The Tribe's written comments will be presented to the Committee for the record.

Respectfully submitted:

J. Taken Alive

Jesse Taken Alive, Chairman
Standing Rock Sioux Tribe

THE ONLY WATERS EDGE RESORT ON LOWER LAKE OAHE 10 MILES NORTH OF DAM ON HIGHWAY 1804
610 N. Jackson
Pierre, SD 57501
605/224-8336

September 30, 1993

Ms. Alma Ripps
Senator Baucus's Office
511 Hart Senate Office Building
Washington, DC 20510

Dear Ms. Ripps:

Thank you for allowing us to submit written testimony for the Environment and Public Works Committee meeting in Glendive, Montana. As our representative Randy McKee told you on the telephone, we would be happy to send someone to testify if you determine that it would be helpful to do so. Please submit the following text into the Congressional Record.

Mr. Chairman and honorable members of the Committee, my name is John Brakss. I am a down river neighbor the Chairman's home state of Montana and a concessionaire located at Spring Creek on Oahe Reservoir. My concession is approximately eight miles north of Oahe Dam, and approximately sixteen miles north of Pierre, South Dakota. I have held a lease on this property with the Corps of Engineers since 1982.

After speaking with Senator Baucus's aide, Ms. Ripps, and learning that there were plenty of entities to speak about specific problems, I decided to confine my comments to the general unacceptable attitude so relentlessly displayed by the Corps. I believe this is the gravest problem concerning the Corps of Engineers. The sovereign attitude so consistently displayed by Corps people at all levels of the bureaucracy reeks of unreasonableness and autocracy.

To illustrate these claims, I will use an example of an instance this summer. Please don't consider this an isolated occurrence. I am illustrating only one occurrence simply for the sake of brevity for the Committee and the Record.

I have had a great deal of difficulty dealing with local Corps of Engineers personnel for the last five years. Up to that point, I found personnel from the local real estate division and the local lake management division to be reasonable; sometimes even helpful. When the current lake manager and the current real estate officer came on board, the situation changed dramatically.

I have been repeatedly barraged with infamous Corps bureaucratic behavior. These frustrating behaviors by the Corps have come in the forms of repeated attempts to arbitrarily diminish the size of my lease, refusal to compromise on any items, loss of the use of part of my lease land due to an previously-known insignificant archaeological site, refusal to allow legal, state-sanctioned video lottery devices and in general an attitude that clearly indicates the Corps believes it is autonomous. The problem became so bad that I had to hire a professional lobbyist to represent me in dealings with the Corps.

I became so frustrated by the behavior of the local Corps personnel that I wrote a letter to Mr. Barry Frankel, Chief of Real Estate in Washington. I complained about several of these items and added some ideas for remedies. I complained specifically about the intolerable behavior exhibited by the local Corps personnel. Mr. Frankel's advice for me was to contact the very person I complained about to have my complaints satisfied. Mr. Frankel cavalierly dismissed my suggestions for remedial action concerning the other problems.

This clearly indicates the autonomous attitude of the Corps comes directly from Washington. I am beginning to believe the Corps actually has more power over my everyday life than does the U.S. Congress. The Corps certainly has more power over my everyday life than does my own State government.

I have asked Senator Thomas Daschle to assist me in getting state-sanctioned video lottery devices in the lounge area at my concession. When I requested approval from Colonel Stewart Bornhoft, Omaha District Engineer, I gave solid reasons why my operation should be allowed video lottery. The request rejection was simply more dogmatic Corps of Engineers autocracy. I have enclosed letters from myself to Mr. Frankel, his response to my letter and the letter from Colonel Bornhoft to my representative, Mr. McKee to illustrate the Corps attitude.

While I realize that video lottery is not a top priority of the Corps or this Committee, the 14th Amendment of the U.S. Constitution guarantees that no state may deny me property without due process of the law, nor deny me equal protection of the laws. Apparently, states can't deny me these rights, but the Corps of Engineers can. The Corps is clearly denying me property rights by dictatorially and dogmatically rejecting my request to install state-sanctioned video lottery games in the lounge area of my concession. South Dakota law says that if I qualify for a video lottery license, which I clearly do, that I am allowed to install the games. I believe the Corps is denying my guaranteed protection under the laws.

Mr. Chairman and members of the Committee, you know much better than I about the foundations of the United States. I get the feeling, however, that neither you nor the Founding Fathers ever intended that a governmental agency could become so bureaucratic and maintain its autocracy as the Corps of Engineers has so clearly done.

I am just a small business man trying to make a living by offering products and services demanded by my customers and offered by two nearby competitors located on private property. I know my story is just a small drop in a large bucket, but if Vice President Gore is serious about making government better for the people, as I'm sure the Committee is, something must be done to make the Corps accountable. At the very least, I shouldn't be punished for doing business

with the federal government. Whatever is done must be done immediately. My business is suffering, as I'm certain many others that deal with the Corps are.

Thank you for placing my concerns in the Congressional Record. Please let me know if I can be of service to you.

Sincerely,

John Brakss
Spring Creek Resort, Inc.

THE ONLY WATERS EDGE RESORT ON LOWER LAKE OAHE 10 MILES NORTH OF DAM ON HIGHWAY 1804
610 N. Jackson
Pierre, SD 57501
605/224-8336

June 30, 1993

Mr. Barry Frankel
Director of Real Estate
U.S. Army Corps of Engineers
20 Massachusetts Avenue, NW
Washington, DC 20314-1000

Dear Mr. Frankel:

I had a telephone conversation with retired Major General Tom Sands a few days ago. He suggested I contact you regarding some problems I have had with our local Corps of Engineers personnel.

I have had a lease on Lake Oahe in South Dakota since 1982. Originally, it was only a bait shop and a few slip rentals. After a few years of operating this small business, I was told by Colonel Blair from the Omaha District Office that I would have to expand my operation according to my original development plan or I would lose my lease. My original intent was to expand. However, I found it impossible to obtain financing on government land with only a ten year lease. After considerable effort and lengthy procedures I was finally granted a twenty year lease, which helped me secure financing. I proceeded with construction.

I excavated a portion of a nearby bay to allow for additional slip rentals, built a restaurant and lounge, put in electricity for campers and boats, constructed 10 two and three bedroom cottages, built more docks, installed a lift station, installed municipal water and sewer lines, and landscaped the expanded project. I also negotiated the construction of a breakwater with the State of South Dakota. A Community Block Grant, with additional funds from the EPA allowed me to develop a sewer and water district. All three of these projects enhanced and expanded public use of the area. These projects were completed by the end of 1988.

This is when the trouble seemed to start. First, the portions of the bay that I had excavated went high and dry due to the record low water levels in Lake Oahe. I had to move the docks to a different location in my leased area. The new area was much smaller, adversely affecting the number of slips I could rent. To make matters even worse, I was told by local Corps personnel that this portion of my leased land was on an archaeological site. I reminded them that one of the conditions of the lease expansion was that any additional property put in the lease be archaeologically cleared. At the time I signed my agreement with the Corps, the land in question was in fact cleared.

The Corps personnel simply told me that things had changed. Period. With the help of public intervention and meeting after meeting, the local Corps representatives agreed to let the slip renters use the area in question on a restricted basis, for parking purposes only. This was the only access the slip renters had to their boats.

Within the last thirty days, the archaeological site has been expanded even further. I have no idea where this will end. To provide a little perspective here, this site was first marked in the late 1950s and has been a public use area since the construction of Oahe Dam. The Corps has placed outhouses and has planted trees on the site. Arguably, every point on Lake Oahe has had primitive activity at some time or another. I believe any federal legislation or rules passed were intended to allow for the gathering of prehistoric information and not intended to be used as an harassment tool or to stifle public use and development.

Our next problem concerns legalized gaming. In 1989 the South Dakota Legislature passed a bill that allows state-sanctioned video gaming. The primary requirement for holding a video lottery license is that the establishment have a valid, on-sale liquor or beer license. Every license holder in the state is taking advantage of the popularity of these state-sanctioned games, with the exception of the few of us who have leases on Corps property. Major General Sands told me that lottery tickets are being sold elsewhere on Corps land. Additionally, with the acceptance of riverboat gambling on Corps jurisdictional waters, it seems to me that overall Corps policy does not prohibit gaming where local governments have made it legal.

I have made repeated requests through normal channels to place the video lottery machines in my lounge. Each time I have received a resounding NO. The sale of liquor has been made available on project lands to insure a viable, competitive atmosphere. State-sanctioned video lottery machines should be allowed for the same reasons.

The third problem I will address in this letter concerns a perimeter road that once provided through access to the peninsula on which I am located. In 1987 a portion of that road was closed by the Corps due to shoreline erosion. My project is now on a dead end road. I have made repeated requests to have this road reopened. I have had no luck. One of the primary arguments made by local Corps representatives is that the land to reopen the road is privately-owned and would have to go through the condemnation process.

I understand that the condemnation process is not the most desirable procedure for the Corps. I have suggested a land trade to the local Corps representatives. I am still willing to pursue this avenue. I am willing to purchase the necessary land to reopen the road and trade it for a portion of my lease that is not contiguous with the rest of the lease. I have enclosed a map for your inspection. A land swap would be a simple and efficient method to reopen this road that is essential to my business and restores a beautiful shoreline drive to the public.

The final problem I will address in this letter, though there are many more, is the attitude of the local Corps representatives. I have worked with three different project managers and three different local real estate directors during the course of my relationship with the Corps. The project managers I have worked with are Mr. Dave Kattelcek, Mr. Eldon Henderson, Mr. Rick Moore and, currently, Mr. Cliff Weber. The local real estate directors I have worked with are Mr. Dave Loop, Mr. Dallas Moon and, currently, Mr. Dale Kastner. The former Corps project managers and real estate directors were a pleasure to work with. They actually seemed concerned about making my project a success.

This attitude, however, has not been present in Mr. Weber or Mr. Kastner. Their personal philosophies on the development of this beautiful reservoir may be interfering with their duties as managers. There is an endless list of individual incidents with which I will not bore you. I would be happy to provide detailed accounts if you request them. Several projects on Lake Oahe have gone bankrupt. I think this is probably a combination of not being allowed to compete fully with other resort projects on privately-owned land and lack of cooperation and help from your local management people. I obviously don't want to join them.

A specific incident that happened recently will illustrate the local attitude. The Corps drilled a well on the lease many years ago. At that time, the well was the only source of drinking water. Since the municipal water and sewer district was developed, I have been using the well water only to irrigate the grass on the project. During a recent meeting with Corps representatives, we were told that the well would be pulled. The local Corps representatives claimed that the decision to pull the well came from Rick Noel, manager of O&M in the Omaha District Office, due to liability concerns. The day after we were told that Mr. Noel had suggested this, we called him to make our case for allowing us to use the well for irrigation purposes only. Mr. Noel told us that he wasn't the person who made this recommendation. He said it was Cliff Weber who made the recommendation. Mr. Noel said he would call the Pierre office and let them know he didn't oppose letting us use the well. The very next day, the Corps local real estate office called and said we could use the well for irrigation purposes.

This incident also illustrates why I am forced to go over the heads of the local Corps representatives to get help with solving some of these problems.

I regret that I have had to circumvent normal channels. I apologize for taking so much of your time with this lengthy correspondence. This project has my and my family's full financial and personal commitment. The unnecessary frustration we have experienced is difficult to put into words. We sincerely hope you understand our concerns. Major General Sands has indicated that he would be willing to provide needed assistance.

Thank you for your time. Please feel free to contact me if you need more information or clarification.

Sincerely,

John Brakss, President
Spring Creek Resort, Inc.

cc: Major General Sands
Senator Daschle's office

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
215 NORTH 17TH STREET
OMAHA, NEBRASKA 68102-4978

REPLY TO ATTENTION OF

July 27, 1993

Real Estate Division

Mr. Randall W. McKee
Professional Advocacy
106 West Capitol, Suite Six
Fort Pierre, South Dakota 57501

Dear Mr. McKee:

Thank you for your letter dated May 31, 1993, in which you requested on behalf of Spring Creek Resort, Inc., (Lease No. DACW45-1-82-6051, Oahe Dam and Lake Project, South Dakota), permission to operate video lottery machines in the bar area of the marina's restaurant.

As you are aware, the Corps has reviewed a variety of long-standing policies on Corps' recreational projects. You were previously provided a copy of Recreation Policy Letter 93-03 (Revised Policy on the Sale of Alcoholic Beverages). The policies regarding gambling and the sale of alcoholic beverages were reviewed at the same time.

Your letter references several key elements which you requested to be considered in favor of changing current policy on video lottery machines. Please be assured that all of these elements were seriously and carefully considered during our review.

Historically, we have encouraged water-based, family recreation at Lake Oahe. Facilities generally have been developed to support the public's enjoyment of outdoor activities and recreation.

The sale of alcoholic beverages on Corps' projects is permitted only in establishments which traditionally provide the sale of such beverages in conjunction with other services within the establishment. The controlled sale and consumption of alcohol is viewed as

incidental to other refreshments purchased by the public while enjoying outdoor recreation.

We maintain that video lottery machines at Lake Oahe are not incidental to the water-based, recreational atmosphere fostered at Corps of Engineers projects. Gambling is an entertainment activity which is considered fundamentally incompatible with wholesome, family-oriented, outdoor recreation.

Between July 1992 and January 1993, this policy was reviewed by a Corps task force which then provided recommendations to the Assistant Secretary of Army for Civil Works (ASACW). As you are aware, the ASACW directed changes in a variety of policies, including alcohol sales, as evidenced by Recreation Policy Letter 93-03. No changes to the current policy regarding gambling were directed.* Therefore, your request for an exception to our current policy is not approved.

I appreciate your interest and understanding of our position. If you have any questions, please contact Ralph Werthmann of my staff at (402) 221-4362.

Sincerely,

Stewart H. Bornhoft

Stewart H. Bornhoft
Colonel, Corps of Engineers
District Engineer

* This was not an oversight or accidental omission. It was a conscious decision to retain existing policies. SHB

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO ATTENTION OF:

September 2, 1993

Management and Disposal
Division

Mr. John Brakss
Spring Creek Resort, Inc.
610 North Jackson
Pierre, South Dakota 57501

Dear Mr. Brakss:

Thank you for letter of July 16, 1993 regarding Spring Creek Resort, Lease No. DACW45-1-82-6051 at Lake Oahe, South Dakota.

Four issues are raised by your letter. The first issue concerns archeological sites identified within your lease area. The archeological site to which you refer was identified in the 1970s after a construction contractor disturbed the area. The northern and eastern boundaries of this site were specifically identified in 1988, prior to the expansion of your current lease area. The site boundaries were more clearly identified during the time you were discussing construction of a breakwater and additional development at the marina.

In cooperation with the South Dakota State Historical Society (SHPO), the Corps has developed a mitigation plan to allow limited activity in certain areas. I urge you to continue to work with the Pierre Real Estate Office to resolve the issues relating to protected cultural sites.

The next issue addressed in your letter is placement of video lottery machines in the lounge area of the marina. The Corps recreational policy to offer water based, family oriented, outdoor recreation, has not changed. Video lottery machines at Corps projects are contrary to this policy, as expressed to you by Colonel Bornhoft, Omaha District Engineer, in his letter of July 22, 1993, to your representative, Mr. Randall McKee. You state in your letter that lottery tickets are "being sold elsewhere on Corps land." Lottery ticket sales are not permitted on Corps project lands. If you will provide us with specific locations or instances where such sales have taken place, we will take corrective action.

The third issue addressed in your letter is shoreline erosion and its effect on the perimeter road adjacent to your lease area. The road was constructed years ago to allow the public access between the Spring Creek and Cow Creek areas. Shoreline erosion eventually forced closure of the road. As you

pointed out, there is not sufficient land to relocate the road entirely on government land. Additional privately owned land would be required. The cost of reopening the road would be a substantial expense to both you and the government. Further, the Corps is not authorized to acquire land which is not required for project purposes.

The last area of concern in your letter is the handling of some of these issues by local Corps personnel. I assure you that the continued success of your business is important to the Corps. Since there appears to be a communication problem between you and the various Corps offices, I suggest that future correspondence and phone calls be directed to Mr. Dale Kastner, Chief of the Real Estate field office in Pierre, at (605) 224-8616. Mr. Kastner will coordinate your questions and concerns with the Lake Manager and the Omaha District. A single point of contact will provide you with more consistent, informed, and timely answers to your concerns.

Sincerely,

B. J. Frankel
Director of Real Estate

Copies Furnished:
Commander, Missouri River Division, Attn: CEMRD-RE-M
Commander, Omaha District, Attn: CEMRO-RE-M

COMMENTS FOR INCLUSION IN THE

HEARING RECORD

OF THE

GLENDIVE, MONTANA HEARING

ON THE

MISSOURI RIVER MASTER MANUAL

FROM

J. EDWARD BROWN

STATE WATER COORDINATOR

STATE OF IOWA

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
LARRY J. WILSON, DIRECTOR

July 21, 1993

Colonel John Schaufelberger
Missouri River Division Engineer
U.S. Army Corps of Engineers
P.O. Box 103, Downtown Station
Omaha, NE 68101

Dear Colonel Schaufelberger:

We offer these comments based on our review to date of the Preliminary Draft EIS for the Missouri River Master Water Control Manual Study and the supporting documents. We thank you for extending the comment period to the 22nd.

In response to your inquiry on Iowa's participation in the meetings on August 3,4,5, 1993 we anticipate having four persons in attendance.

We understand that our involvement in the analysis of the preliminary draft does not limit our comments on the draft EIS when it is submitted for review by others.

Below you will find our concerns addressed at three levels; general comments, comments specific to the treatment of each use of the river resource and finally an attachment which contains page-specific comments on the PDEIS.

GENERAL COMMENTS:

The report demonstrates that the differences in benefits between options do not justify change.

Although much of the text implies that significant improvements can be realized by changes in system operation, none of the options studied in Chapter 5 of the PDEIS increases system benefits enough to warrant a change from the current "modified" Master Manual option. Experience during the recent drought demonstrated the need for higher flows to meet water supply requirements during that part of the year when navigation is not supported. Changes to the Master Manual to further clarify that these flows will be supported would be desirable.

To make other changes to system operation is unwarranted when there is so little difference in the total value of system benefits for the entire range of options. Close inspection of charts such as Figure 5.1-2 on page 5-4, reveal that for the entire range of options considered that the model predicts only about a 3 or 4% difference between the mean and any of the seven options. Table 5.15-3 shows only about a 2% difference in total NED values for the seven options. At the same time Table 5.15-3 clearly shows that one use, navigation, would be diminished by as much as 62% between the current

plan and the selected options. We must also ask if attention was paid to significant figures with regard to the results presented.1

Given the complex nature of the modeling employed and the extent to which it must have been manipulated for each economic use to yield "results that make sense", it is doubtful that anyone could prove that the differences are real even though trends may seem to make sense. It is just as likely that the analysts ran the models until the results yielded a pattern as it is likely that the pattern is the result of physical differences. While the modeling may have been done in an appropriate manner, the results do not support changes in the way the system is operated.

The result of revising system operation would be to redistribute benefits among states rather than to optimize benefits for the system.

In the early stages of the study we understood the purpose of the review was to determine if there was a way to alter system operation for significant benefit. Since there is little difference in the total NED benefits for all of the options identified, the purpose now appears to be to redistribute benefits from the lower basin to the upper basin. The projected losses to lower basin recreation and navigation give credence to this view. This is not a valid purpose.

Most of the options considered in detail in Chapter 5 of the PDEIS weigh heavily on Iowa. As can be seen in tables 5.15-6 to 5.15-8, the changes in system operation work primarily to the disadvantage of Iowa and the other lower basin states by stripping them of benefits.

A simpler approach to the upper basin problem with lower reservoir levels might be to propose to establish a fund to compensate affected reservoir recreational areas for losses due to drought.

The report should include consideration of additional options.

> The next draft should include an option that provides additional support to environmental values for the Iowa reach of the river.

Most of the consideration of fisheries and habitat value relates to the reservoirs and the river reaches immediately below the dams. The river bordering Iowa is given very little consideration. The confined river channel has already taken away much of the historical abundance of these resources. To further destroy the fish and wildlife area and recreational opportunity that Iowans have in order to reduce losses to upper basin recreation interests and to maintain non-native species to support these activities seems totally unwarranted.

Congress and the Corps have already recognized the importance of undertaking the restoration of some portion of the habitat in the lower river that was lost with the completion of the Missouri River Bank Stabilization and Navigation Project. Authorization in the 1986 Water Resources Act signaled the beginning of the mitigation effort. Current efforts to restore limited areas of fish and wildlife habitat on the lower

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1We question whether the model is capable of generating results with the number of significant figures that are reported in tables in the PDEIS such as the one cited here based on the limited precision of various inputs into the model.

river will likely be jeopardized by most if not all of the options under consideration. The Corps should include an alternative in the DEIS which attempts to maximize support for lower river fish and wildlife and recreational values particularly in the reach of the river along Iowa's border. One alternative might be to evaluate how system operation could be modified to create additional side channels and other features that divert flow and create back waters with little or no current while at the same time modifying the system to slow down the velocity of the current in the main channel to better support navigation.

The next draft should include an option that better reflects the method of operation used during the recent drought.

Since the Corps modified system operations during the recent drought in an attempt to reduce releases, the current Master Manual does not provide a realistic basis for comparison on its own. Even though the system was managed on a year-to-year basis during the recent drought, it is important to attempt to simulate that operation as one alternative for the DEIS. While that would provide essentially two baseline alternatives, we at least have some actual experience with the way in which recent operations affect the system. An alternative that closely approximates the operations during the recent drought is as important as ABAA10. It would be easier to understand the implications of changes to the system which would result from the use of a new option if the changes could be compared to conditions which we all observed during the recent drought rather than expecting a comparison with conditions which would have resulted from following the Master Manual as it is currently written.

The next draft should include options run with the existing formula for support to navigation.

Each option that is included in the next draft should be analyzed using the existing rule curve as well as the proposed modified rule curve. Otherwise there is no way to determine which factors are responsible for differences in how the system serves each use.

The PDEIS does not provide an adequate analysis of future conditions in the system.

The PDEIS does not predict the depletions or estimate the availability of water in the system during the entire period this Master Manual is to be in effect. Instead, its analysis is based on 1990 depletions and assumes rainfall according to the period from 1898 to 1990. This does not include likely future depletions, including, for example, the Fort Peck Tribal compact by which that tribe seeks authority to divert up to one million acre feet of water per year. (p. 3-64.).

Because the PDEIS does not analyze water availability in the future, it cannot be relied upon as such an analysis. So, for example, it could not be used for consideration of the impacts of availability of water for a water marketing program or for a Tribal compact or other major federal action resulting in diversion of water. The State of Iowa seeks adequate assurance that this document and these studies will never be so used.2

2We note that the 1977 Water for Energy EIS contained a disclaimer but was nonetheless claimed by the Department of the Interior to be the basis for a one-million acre foot water marketing program. (That program was invalidated by the decision in ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988).)

Because water availability in future years has not been determined, the amount of permanent pool level and remaining water in storage cannot be the only criteria for releases from the reservoirs. In other words, the Master Manual must contain provisions to assure adequate flow for water supply and water quality downstream even when this requires dropping below the permanent pool level. Otherwise, all of the risk of depletions(which benefit the upstream states) is borne by downstream water supplies. Indeed if the criteria used is equalization of benefits by state or region, all risks of future diversions and transfers should come from the authorizing or compacting state or region.

Proof of the importance of projecting future depletions can be found in the Corps' rationale for projecting one non-navigation year under the baseline alternative. It is noted that the plan was devised for no non-navigation years, but that one non-navigation year would now result because of depletions since the plan was written. Based on this loss it is clear that future depletions have real economic consequences for the lower basin interests and should therefor be included in the next draft.

The narrative of the report appears to be biased toward satisfying upper basin claims.

The PDEIS purports to address "contemporary needs" but fails to include alternatives which would maximize benefits to Mississippi River navigation and alternatives which would best mitigate the massive destruction of the lower basin's riverine ecosystem caused by the bank stabilization and navigation project. Rather, the PDEIS appears to focus on contemporary needs of the upper basin.

Iowa's view is that alternatives which would give recreation equal priority with flood control and navigation would require additional authorization from Congress. In contrast, Congress has authorized the beginning of lower basin riverine mitigation, and Mississippi River navigation is clearly important to Congress. It is unreasonable to include alternatives that would maximize reservoir recreation while virtually ignoring the effect of alternatives which could restore the riverine ecosystem in the lower basin in conjunction with structural mitigation to reopen chutes and backwaters. Furthermore, Mississippi River navigation must be properly cast in terms of NED benefits.

Although increased benefits to Mississippi River navigation might be a small percentage of existing Mississippi River NED benefits, the increase in dollars of benefit could be very large compared to dollar increases in NED benefits produced by other alternatives.

Before releasing the Draft EIS, the Corps should expand its analysis of lower river features and impacts including an improved assessment of recreational use and fisheries in the lower river. Deficiencies noted in the sections below on individual uses should be corrected.

Iowa has consistently made the point that our interests include water supply, wetlands, water quality, fish and wildlife and recreation as well as navigation. You cannot review all the material in the PDEIS and the supplements without readily concluding that the effort to assess and quantify upper basin recreation is much more thorough than that for lower basin recreation. The information on reservoir recreation is voluminous

while recreation in the Iowa reach is barely mentioned despite prior comments on the inadequacy of the analysis of recreation in the lower river.

Changing agency views regarding "contemporary uses in the basin" or its perceptions of the desirability of providing equal benefits by state(a political, rather than functional division of the Missouri River Basin) does not justify re-allocation of the purpose of these reservoirs. The Missouri River main-stem reservoirs were constructed primarily for flood-control and navigation. Lake Oahe was constructed to re-regulate the river to provide flows for water supply downstream as compensation for the flows taken from Fort Peck for irrigation. All options for operation of the river must assure that these downstream uses are properly met. We would ask what authority the Corps has to base operating criteria on dividing benefits equally among the states.

If the answer to this question is that the representations of the division of benefits by state are no more than a way to illustrate where the benefits are distributed in the basin without any attempt to equalize them on that basis, then an equally suitable framework for illustrating how the benefits are distributed is to relate the benefits to population.

In any such representation it is critical for the Corps to recognize and to clearly note for the reader the relationship that either representation bears to how the benefits are allocated. For example, the hydro-power benefits are distributed by formula under a contract that can not be changed as a part of this study. In cases such as water supply for thermal power generation, the location of the plant is not the key, but rather the service area.

The call for a study was made at the onset of a major drought period which focused attention on the negative impacts of these times. Analysis of benefits that might accrue to downstream interests for flood conditions were dismissed early in the study on the basis that providing more storage for flood protection would cause serious problems for other uses while providing only marginal additions to flood control benefits. On the other hand, flooding can cause widespread damage that dwarfs the economic losses to recreation in drought. Current experience with flooding causes us to question whether there may be other elements of system operation besides the allocation of storage that might be altered to enhance the system's flood control benefits.

The economic analysis is not consistent among the various economic uses evaluated in the report.

An attempt in the report to balance the economic value of one use off of another is based upon an inconsistent set of economic analyses. In the case of hydro-power for example, the value is determined by its replacement cost. For thermal power generation, the cost of providing for new intake structures or alternative cooling are key factors as well as the ultimate need to replace some production. For recreation, the economic value of the activity is bolstered by including the value of all of the retail services and all of the revenues which have a relationship to the activity.

In order to make a similar evaluation for power production, the value of all enterprises dependent upon power and the revenues and jobs related to these operations would need to be included in the analysis.

For navigation to be equated to recreation, the commercial enterprise that benefits from navigation and the jobs and services that they generate should be included in the

equation as well as the value of all farm income from operations served by navigation or whose rates are impacted by the availability of navigation as an alternative mode.

The complexity of the report and the difficulty of review requires accommodation of reviewers needs.

The length and complexity of this draft and the appendices are too burdensome to expect that those who review this preliminary draft should begin all over again with the next draft. Any changes made from the current draft should be clearly noted by some device such as using a different font anywhere revisions are made in the next draft; at least for one of the copies sent to the current reviewers.

USE SPECIFIC COMMENTS:

Flood control.

While the report does recognize the benefits of flood control, there is far less investigation of the impact of reduced flood control capability in the system with changing options. In addition, there seems to by no way that the model accounts for flood damages as a reciprocal of the benefit of flood control. At times, areas such as Sioux City receive heavy damage as a result of inadequacies of the handling of tributary flows. This damage should be counted against the benefits of flood control in the state in order to have a more balanced assessment of the impact of system operations.

In addition, there is no evidence that the assessment of flooding dealt with the implications for wetlands and other adjacent areas. The method of assessment of the benefits of flood protection from system operation also does not clearly include factors which account for stream bed degradation and channelization which cause negative impacts on flooding of wetland areas. For the Iowa part of the river, degradation combined with channelization causes flooding to become the instrument of deposition of silt and the subsequent drainage of adjacent areas leading to the loss of habitat.

Fisheries:

Emphasis on reservoirs.

The Corps has focused on endangered species and reservoir fisheries and recreation to the detriment of downstream recreation and fish and wildlife. How does this result occur? Much of the effort to reduce the impact on reservoir recreation is focused on non-native species that are there to support the recreation base. Higher pool levels will help these imported species. Higher pools allow the Corps to better simulate natural river conditions even though that is a faint approximation at best because it merely adds some diversity to the hydraulic conditions on a seasonal basis.

Flow alone is not a solution for improvement of riverine fisheries.

The focus on altering historic flows to generate a different environment in the fishery, including those that attempt to mimic the natural hydrograph ignore the fact that such a change is not much more than symbolic at least for the Iowa reach of the river. The

structural modification of the system left us with a river that is still a controlled channel whether you have 12,000 cfs at Sioux City or 25,000 cfs. Therefore, low flows do not expose that much new surface area such as sand bars to foster new habitat. While high flows may cause the river to leave the confines of the channel, past flooding of wetlands and oxbows has resulted in substantial deposition of sediment eliminating large portions of these remaining areas. Since water released from the reservoirs would be relatively clean, siltation may be minimal. It is not clear however, that flows in the Iowa reach during drought years will be high enough under any of the alternatives to result in substantial flooding given the degradation of the stream bed. Once the flows are reduced, the degraded river channel creates such low stages that the difference in head will cause water to drain from oxbows back into the river.

From the perspective of operating to protect the pallid sturgeon, we would make several observations. First the increased cold water reaches down stream from the reservoirs seem to be alien to the natural habitat of the sturgeon. The lower river would hold more promise in a recovery plan. The Corps should look at mitigation measures that could improve the lower river even under current flows. Steps to slow down the river by diverting flow into extensive side channel areas while maintaining navigation would be most productive.

Habitat

It is critical that alternatives in system operation be evaluated for their impact on fish and wildlife mitigation projects. Once these areas have been restored to a condition that they represent important habitat for fish and wildlife they will become an important link in the support and maintenance of all species in or along the river. Low flows combined with the impacts of stream bed degradation will mean that wetland areas along the river will be in extreme jeopardy during drought years. Failure to protect these areas and to include analysis to ensure that they are not harmed will be important for the next draft of the EIS. Otherwise money will be wasted and the foundation of support for critical habitat areas will be gone.

Stream bed degradation apparently was not included in the analysis. This would seem to directly negate the value of the analysis of the flows as a measure of how they will result in inundation of backwaters and oxbows.

Navigation.

The Corps moved to the proposed new navigation support scenario for all options. Running both existing and alternative navigational support options would have allowed for a comparison in each case. Besides the statements in the reports, the Executive Summary , page 10, par. 3, also suggests that the modified navigation criteria is superior because it reduces the number of non-navigation years. It appears that shortened seasons or reduced service were not adequately assessed in terms of their likely impact on shipments in future years. An analysis of the impact of the alternative system of navigation support in Table 5.12-1 shows that there would be substantially more years with less than full service to navigation. The Corps maintains that the benefit to the approach is that it reduces the number of non-navigation seasons. Since no alternatives except the current Master Manual were run with the existing rule curve, it is impossible to tell if some alternatives might be acceptable in terms of seasons with reduced support.

Mississippi River

Iowa has previously noted the need for the study to consider the impact of Missouri River flows on the Mississippi River. In particular we noted the need to study the costs and benefits derived by operating the Missouri to benefit the Mississippi River and the need to establish a target flow for the Mississippi River. In Volume 6D it is clear that the Corps recognizes the importance of Missouri River water to the Mississippi River navigation (as did Congress in the Flood Control Act of 1944). On page 27, for example are several quotations which cite both the dependence upon water from the Missouri and the impact that changes in system operation could have on Mississippi River flows. It is not completely clear from our review of the documentation and discussion with staff that all of the economic costs of groundings are included in the Corps' analysis of navigation economics. We would ask for clarification of the assumptions made and the costs associated with years where groundings are predicted. The Corps should detail the assumptions made to evaluate the impact of groundings and include them and the resulting costs in the next draft of the PDEIS.

The summer of 1988 saw a multitude of impacts as navigators were subject to restrictions on allowable draft, tows had to be segmented, in addition to the groundings; all of which added costs to the process of moving goods. Shippers also moved to alternative modes such as rail or shipment through the Great Lakes/St. Lawrence Seaway. As then Asst. Secretary for Civil Works, Robert W. Page noted in his testimony to the Merchant Marine subcommittee in the Senate, the closure at Greenville, Mississippi alone at one point caused 130 tows to be delayed. This translates into 58,500 rail cars.

Finally, we continue to be concerned that spreading the losses of a single year over the 93 year period of record also minimizes the impact of the event.

Benefits Analysis:

A season with no navigation clearly has negative impacts, and the projections of less than full recovery accounts for the dislocation of business to other modes. On the other hand, a series of short seasons or ones with less than full service will also cause great losses as the past few years have documented. The extent of recovery will not be known for several years, but we anticipate that a substantial portion of the over 40% reduction in traffic will not return.

A further point might be that the PDEIS in several locations including pages 4-82 to 4-85, characterizes the economic costs to recreation as substantial while the parallel analysis of navigation impacts is characterized as minor. The cost to recreation operations on the reservoirs is focused on a few sites which are susceptible to difficulties if water levels drop, i.e. poor site selection. The losses related to navigation are more dispersed due to their impact on all shippers in the local area as well as to operators. Another comparison between the two uses is the relative percentage of the impact. Navigation on the Missouri has been impacted two to four times as much as upper basin recreation on a percentage basis.

Split Season:

The discussion of split navigation seasons implies that there is a fisheries benefit which results from low summer flows. That benefit will likely not be realized in Iowa. Support for less than full navigation flows at Sioux City will mean the drying down of

our wetlands, limitations for recreation on the river and the creation of impacts on water quality from power plant discharges.

Recreation:

Reviewing the recreation report gives rise to several key observations. First, the entire Master Manual Review process springs from the assertion that upper basin recreation was being unduly harmed by operation of the system during drought. While there are attempts to look at the issue as a complex one, a simple fact emerges from a review of the options. By changing the operation of the system, the upper basin which has an abundance of recreational resources within the system will benefit with even more. The lower basin which has also been affected by the drought will be asked to sacrifice even more to provide benefits to recreation in the upper basin. Given that the Corps has failed to adequately quantify lower basin recreation, the losses do not seem as great as they really are. While flows to support navigation may create the need for the water, the result of any attempt to alter this support will cause harm to lower basin recreation.

A review of the recreation technical report yields the conclusion that there is no intent to equitably evaluate recreational use of the river basin resources. In comments on previous occasions (e.g. comments upon receipt of the original technical report on recreational use), it was clearly noted that Corps reliance on interviews of fishing license holders was not an adequate measure of recreational use of facilities along the river in the Iowa reach.

A careful review of the survey form in Volume 6C shows that it was directed at identifying only uses which occur on the river itself, not all of the uses affected by the river. There are no questions on the survey form that ask respondents about their use of off-channel areas such as wetlands and oxbow lakes. While it has been stated that respondents could tell about use of other facilities if they chose to do so, it is clear that the questions are focused on the river channel and there is no encouragement to look to a broader view. As noted earlier, Lake Manawa, Lewis and Clark Lake, Brown's Lake, Snyder lake and other areas are all unaccounted for. In addition, hunting, hiking, bird watching and other uses of public lands along the river are disenfranchised. We also find no evidence that the federal facilities at DeSoto Bend were ever included.

All of these uses should be included because their existence is tied to flows in the river. As river stages are lowered, the water in these areas is drained away. The study analyzes reservoir recreation at length and evaluates use in great detail while resorting to haphazard counting of the down stream uses that will be negatively impacted by reductions in flows. The Corps should revisit this issue and do an on-site investigation of major recreational facilities on the lower river before issuing the DEIS.

In recent months, Sioux City has seen the start of a riverboat casino operation. Early operational experience shows attendance at about 7,700 per week. Based on average expenditures which have been provided to the operators, this usage translates into an approximately $3,000,000 per month revenue stream that by Department of Economic Development information would be re-spent in the local economy at a multiplier rate of 4.5. This operation has become an important element of lower basin river-based recreation and its value to the region must be included.

The maintenance of spawning and nursery areas adjacent to the river in Iowa is an essential element to the preservation of the recreational use of the river and the health

of adjacent oxbows and wetlands. This is not a simple process. Lower flows in the river will cause these off-channel resources to dry up. If they are laden with silt, higher flows that reach into these areas, will result in sediment deposits that reduce available acres of wetland--slowly converting it to other types such as riparian woodland. Plans that attempt to improve fisheries in the Iowa reach of the river must ensure that these effects are minimized and that the development and maintenance of these areas and their connection with the river is maintained.

Providing for additional recreation in the lower river would prove to be a good investment since the large population base would yield the greatest economic benefit from an incremental increase in investment in system improvements. As was noted by Dr. Dickey, Acting Assistant Secretary for Civil Works at a meeting of water resource professionals in Mobile, Alabama, with little or no ability of the federal government to initiate major new water projects, it is important to find ways to invest in modifications to existing projects to reap more benefits. We believe that investment in lower basin fisheries and recreation presents such an opportunity.

Water Quality:

The water quality modeling that the Corps has employed does not adequately predict water quality consistent with how violations are enforced under the Clean Water Act. Water quality standards are imposed at the edge of the mixing zone, and are not just used to define minimum water quality of a large river reach. Because the Corps modeling did not look at near field effects with the exception of temperature, the analysis of water quality in the report is deficient.

Using the results of "far field" models to evaluate "near field" conditions regarding water quality is not appropriate. Localized impacts should be accounted for. Other pollutants in addition to temperature should be evaluated in and around the mixing zones of major discharges prior to the completion of the DEIS. Our view that the modeling used to evaluate water quality was deficient for its intended purpose as well as a number of other issues has been noted to the Corps much earlier in the process, and are noted in the attachments.3 These detailed comments should be considered in revising the PDEIS.

We are also concerned about the implications of the high flows from a tributary discharging into very low flows in the Missouri. This could cause water quality problems, particularly at times when the tributary basin has been subjected to widespread application of agricultural chemicals.

Water Supply/Power:

The primary interest in this part of the system analysis is rightly on the impacts on power production. For every option studied, power production represented over 75% of the total cost impact of all uses. A preliminary note would be that the report does not look back to evaluate the costs imposed on utilities which have already decided that they must make improvements to their water intakes or take other measures to support reliability in drought.

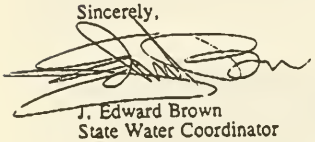
3John Olson of the Department of Natural Resources has provided several memoranda detailing concerns about the application of the QUAL2E model as it has been for this study.

It is not clear whether the Water Supply Module of the Economic Impact Model considers capital costs by short time segments alone or for a long panning horizon. (See the last paragraph of page 19 of the supplement.). Whatever capital costs are assumed, they must be assumed for the long term. Once incurred, the annualized capital cost extends up to 40 years into the future.

On page 7 of the technical report it appears that for irrigation both the costs of irrigation and the cost of crop losses are included. If that is the case, the accounting of impacts seems to be counting twice for this use.

Hopefully, these comments in addition to the specific comments on the PDEIS and the other attachments to this letter will provide you with a clear understanding of our analysis of the report. We hope that you can address some of our concerns at your meeting in Omaha on August 3-5, 1993.

Sincerely,



J. Edward Brown
State Water Coordinator

SPECIFIC COMMENTS OF THE PRELIMINARY DRAFT EIS

The following is a page-by -page commentary on specific elements of the preliminary draft.

Page 2-13, The detail on the revised rule curve for navigation shows that support for navigation will be diminished either through imposition of minimum service flows or shortened seasons based on July 1 storage levels which are greater than current carryover multiple use storage levels of 57.1 MAF. This seems to be too extreme.

Page 3-13. The discussion of the stream bed degradation is fairly minimal. It does not address the off channel impacts and from our reading of the documentation, the impact of degradation on river stage may not be incorporated in the analysis of such features as the impacts of specific flows on adjacent wetland areas.

Page 3-19. The analysis of water quality problems in the system does not discuss the impact of tributary flow contaminated with pesticides and fertilizers discharging to the river rather than to a reservoir. We are concerned about the impact that such an event could have on the fishery in the river if the mainstem system was being controlled at a low flow rate at the time of such a localized event. A large, contaminated tributary flow could have considerably more impact if it merged with a relatively small Missouri River flow. This topic also relates to our concern that analysis of water quality is too generalized to relate to such site specific impacts.

Page 3-22. The delineation of the various types of wetland and riparian areas is quite useful. Unfortunately it is not used consistently later,(See Table 5.5-1, page 5-64.) where it seems that the point is that wetlands are maintained when we are seeing a projected rise in the potentially forested land which often becomes corn acreage. All of the analysis of changes in wetland and riparian acreage in the PDEIS should use the detailed breakdown found here in order to facilitate better understanding of how the options will impact these critical areas.

Page 3-28 to 3-31. Figures 3.6-1 to 3.6-3 could be enhanced by showing some breakdowns of habitat along the lower river in the same place. The way the section is organized reduces contrast between the two parts of the river and dampens the impact of the point that the lower river has much less remaining wetland area. The analysis might also show the relative value of the efforts in the Missouri River Mitigation Project to rehabilitate some of the remaining areas. This section should also include more analysis of the fact that the wetlands in the lower river are usually disconnected from the river which greatly reduces their fisheries value. It might have also been noted that flooding such as the floods in the mid 1980's have silted in vast areas of some oxbows. This phenomenon reduces the benefit of flooding which is promoted in some alternatives. As noted elsewhere, flooding due to releases of cleaner water might fill in wetland areas less than flooding caused by rainfall with its attendant sediment load.

Page 3-51. The discussion of riverine fisheries notes that one of the values of increasing flows in the spring would be to trigger spawning while it would not effectively increase habitat. This statement illustrates the futility of looking only at one factor of simulating a natural river condition. Simply approximating a natural hydrograph won't return the vast backwater system in the lower river, won't recreate temperature conditions, turbidity, plant life and other factors critical to the health of the fishery.

Page 3-58 and following. The discussion of flood control indicates that flood protection and the reduction of loss is used as the measure to value flood control features of the system. Flood damages must also be put into the equation in order to secure an equitable picture. Even during the drought, Sioux City, for example has sustained much damage from tributary flows that are related to the system. These damages offset the projected benefits and provide a basis for identifying opportunities to improve flood control benefits.

Page 3-64. It is noted that the study depletions do not include tribal rights. The Ft. Peck negotiations are complete, and the representations by tribal counsel are that there is no need for Congressional action for the rights to be perfected. We understand that they maintain that they need Congress primarily to ratify a marketing scheme. The plan should project what the impact of the use of these rights would be on system operation to allow evaluation of the proposed options in the light of what may be the ultimate impact on downstream flows.

Page 3-66. The discussion of the need for power generators to respond to low flows illustrates the speculative nature of this exercise. The need for firm commitments would actually require action to plan for modifications to cooling water systems as soon as the likely low flows are known based on the final option that the Corps selects. Since the time to construct alternative cooling is likely longer than accurate predictions of drought, measures will need to be evaluated immediately. In those cases where it is technically and economically feasible, alternatives would be planned. In this event, we anticipate that the costs of the alternatives will be imposed sooner and more routinely than the current study parameters anticipate.

Page 3-76. It is noted that lower flows will limit river recreational activity and access to marinas. It is not clear that these limitations are included in the assessment of negative impacts on lower river recreation.

Page 3-88. The description of recreational activity fails to note all of the oxbow lakes which including Lake Manawa, Lewis and Clark Lake, Snyders lake and Brown's Lake, account for the majority of recreational activity in this reach of the river. In addition, The DeSoto Bend National Wildlife Refuge also seems to be missing from this inventory. Since the riverboat casino in Sioux City is also operational, its impact needs to be incorporated as well.

Page 4-30. Table 4.5-1 illustrates the point that Iowa takes a major share of the losses from the alternative management systems. In particular it is interesting to note that the Iowa reach is harmed by the intra-system regulation changes that would seem to be neutral to lower basin states.

Page 4-41. The discussion of cold water habitat gives rise to the question of the priority for maintenance of an environment that is not natural to the river to support fish that are stocked in the river. It would be more rational for the Corps to do an analysis of the fisheries in the reservoirs from the standpoint of maintaining species which are native to the Missouri.

Page 4-63. Several tables such as Tables 4.8-1, 4.9-1, and 4.11-1 offer comparisons with 0/+ designations. It is unclear to us what assumptions, analyses or dollar amounts are used as the basis for making these assessments.

Page 4-71. The inconsistency of economic analysis creates another uncertainty regarding the comparison of uses based on value. In the case of hydro-power, replacement costs are calculated. For thermal power production the cost of modification of systems or replacement of capacity are the measures. For recreational use, a more comparable analysis might have been the cost to relocate access with falling reservoir levels and perhaps the cost of some recreationalists traveling to the next available location. If other uses were evaluated on the same basis as recreation, assessment of the value of power production would require the inclusion of the value of all business served by electricity, residential values as well as income streams for all enterprise. For navigation to be viewed in a comparable light, the value of all enterprise related to moving and handling the products as well as all farms that benefit from the presence of navigation would be included in the analysis. Discussion on page 4-85 recognizes that there are a multitude of primary and secondary activities impacted by navigation or its cessation, but these impacts are not quantified. While each method of calculation of the value of uses may seem logical on its own, they are clearly not comparable.

Page 4-82. In the discussion on power in 4.13 it indicates that people in the state where a power plant is located would first bear the cost of upgrades to intake structures and other measures. Power service does not coincide with political boundaries, so that customers "in that state" may not be appropriate. In addition, the discussion of how costs would be allocated regionally likely is inaccurate in its attempt to simplify what could amount to a number of operational options which could affect who pays and how much.

Page 4-89. The discussion of the split navigation season illustrates the ethereal nature of some of the possible benefits. While the losses to the downstream economic interests are fairly quantifiable, the benefits can at best be speculated as resulting in a few percentage points increase.

Pages 5-2 and 5-4. These tables illustrate the point that the differences between the options are essentially minor, but look more dramatic by the expansion of the scales. As noted earlier, this method of displaying the data obscures the reality that differences in total benefits are essentially non-existent.

Page 5-38 and following. The discussion here illustrates that there would be beneficial value to a Mississippi River target during some critical months during drought years. At the same time it indicates at the beginning of the discussion that none of the alternatives includes a Mississippi River target. Such an addition would seem appropriate.

Page 5-64. This table illustrates the previously noted concern that the definition of wetland and riparian areas is not uniformly followed to the detriment of anyone trying to compare the significance of differences between options.

Page 5-146. This section discusses cold water river habitat. If the pallid sturgeon is not benefited by cold water habitat, how can this type of area have a positive benefit for the system? The lower river has great potential for improved warm water habitat and should be the focus for pallid sturgeon recovery plans.

Page 5-194. This table provides another illustration that the negative impact of the changes on Iowa.

Page 5-199. We disagree with the inference that Iowa's thermal water quality standards are applied in too stringent a manner. As noted earlier, the study may underestimate the real cost of measures by power plants to install alternative cooling measures.

Page 5-201. This table illustrates an unreasonable burden on Iowa with the operation of the system under one of several of the alternatives. It should again be noted that a comparison of per capita benefits might be a better way to illustrate the impacts of changes in operation.

Page 5-204. The discussion of the impacts on hydropower focus on the increased impact during the shorter critical 21 year period as opposed to the 93 year period of record. A similar analysis of navigation which included a larger penalty for less than full service seasons would provide a more balanced picture.

Page 5-225 and following. The recreational benefits would be a more reasonable comparison if all of the river related recreation activities in Iowa were included. The facilities cited in the discussion of page 3-88 above represent some of the most significant resources on the river.

Page 5-228. Section 5.12.1.1 indicates that a 1% loss of flow due to consumptive uses has caused the 1 year non-navigation season to appear in the 93 year period. This sensitivity to total storage makes it all the more important that the Corps include likely tribal water use and other future potential depletions in some form of analysis before further reducing flows to lower river interests.

Page 5-230. This dialogue should be modified to reflect a more significant reduction in use based on one or more years of reduced service as noted above. The current discussion indicates only that non-navigation seasons will cause long term displacement of navigation traffic.

U. S. Senate Environment and Public Works Committee
The Honorable Senator Max Baucus, Chairman

Oversight Hearing: Review of the Missouri River Master Water Copntrol Manual
Glendive, Montana
October 11, 1993

Testimony by Keith Casterline

Senator Baucus, Senator Conrad and Members of the Committee:

My name is Keith Casterline. Evelyn, my wife, and I farm in McCone County about 18 miles south of the Missouri River

In the 12 years previous to 1992 our farming production suffered because of the extended drouth, but our costs were still there.

The original Act, with the Pick-Sloan Amendment, has been good for individual farmers and ranchers. It's been good for Montana, especially Eastern Montana, and our Nation.

The Corps of Engineers and the Bureau of Reclamation seemed to have done a very good job at Fort Peck in former years of taming the muddy Missouri, but in the last 15 years, or so, we have all been short of water. At times like that we seem to become very impatient.

I believe, that throughout the Missouri River System, the most important result for us that live in the rural agricultural areas was the availability of electric power to preference customers and the formation of REA so that we could build Rural Electric Cooperatives.

The farms and ranches and small towns that did not have central station power then began to pay electric bills for power generated at a Corps of Engineers dam.

The sale of electricity has been the important source of payback to the Federal Government.

If the procedures of handling the River are changed too much, the priorities as legislated will be changed. This could lead to the necessity of Western Area Power Administration to purchase power so it can supply the contracts to the Preference Customers, as has to be done in times of drouth and low water. When this happens the higher cost of the purchased power is passed on to the consumers.

I am concerned that all the changes that are being made in the control of the river flow created by catering to the Least Tern, Piping Plover, Pallid Sturgeon, Snail Darter, barge traffic, fishing and boating, to name a few will affect the generation of electricity, and would , undoubtedly, result in higher costs to the consumers.

There should be ways that these interests pay for some of the cost, especially, the extra costs incurred by changing the original intent.

Thank you very much for your time and the opportunity to attend the hearing in Montana.

Keith Casterline

LAZY S RANCH
Box 1254
Bismarck, ND 58502

October 8, 1993

Senator Kent Conrad
United States Senate
Washington, D.C. 20510

RE: SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
OVERSIGHT HEARING ON CORPS OF ENGINEERS
MISSOURI RIVER MASTER WATER CONTROL MANUAL

Dear Senator Conrad:

Thank you in advance for this opportunity to submit commentary to the Senate Committee on this very important matter. When appropriations are made for repairs to the Mississippi River System caused by the "Great Flood of 93", I hope North Dakota's needs are included amongst the other high priorities.

For the past 30 years, at least, the last remaining stretch of open native Missouri River Valley bottom land between Garrison Dam and the upper limits of Oahe Reservoir has been systematically decimated by the Corps shameful, notorious operation of the reservoir system. Certain areas of the river have been losing up to 100' of bank depth per year, adding to the creation of more sandbars, shallower river depths, filling in of main channels, etc. Our River Is Dying! Many landowners are fraught with despair. The Corps, all the meanwhile, has remained incogitant to both the environment and ownership rights. If something doesn't change, our river will become nothing but a stinky ditch filled with willows and cattails and occasionally 3" - 4" of water from the East Bluff to the West Bluff, good only for raising mosquitoes!

Really, what does it take to start bank stabilization projects - completely rip-rapped if necessary, to prevent this carnage of the land, and thereby keeping the river in some identifiable channel?

Senator Q. Burdick (deceased) started with public meetings almost 10 years ago, and to date, we still have no changes - only lip service and piles of printed rhetoric! What the Corps needs to do is; "Quit the foot-dragging" and

start getting the job done!. We need an agency that is responsive to the needs of the people and our environment. What is happening here in North Dakota, and elsewhere, is a damn crying shame! Giving the Corps the responsibility of changing the "Master Manual" is like writing one's own job description - where's the incentive to change? Looks to me like Senator Max Baucus and crew are gonna have their hands full! I wish them great success in this most important endeavor.

Sincerely Yours,

Duane Dinius

Duane Dinius
Lazy S Ranch
Box 1254
Bismarck, ND 58502

DD/st

October 10,1993

Senator Baucus and Senator Conrad,

My thanks to you and your Committee for bringing this Oversight Hearing to Eastern Montana. Your concern for the recreational benefits of Fort Peck Lake are shared by the Rock Creek Cabin Association.

The Rock Creek Recreation Area is located on the Big Dry Arm of Fort Peck Lake in McCone and Garfield Counties, 32 miles south of the town of Fort Peck.

The demand for services and facilities on the Big Dry Arm indicates a economic opportunity for Eastern Montana. Activities include; fishing, boating, camping, sight seeing, hunting. picnicing, wildlife viewing, nature study, and general dispersed shoreline use.

Fort Peck produces multiple benefits. Montana receives 3.7% of these with hydropower being the highest at 7%. The recreational benefits created by Fort Peck are 16.7% of the total, with Montana receiving 4.2%.

Fort Peck Lake is a resource of Montana and this distribution of benefits appears inequitable. The Montana Department of Natural Resources and Conservation data also indicates Montana's share of flood control benefit is .2%, navigation is equal to 0%, water supply benefit is 3.7%.

Fluctuating lake levels to the extremes of 2250 to 2160 feet above sea level would have disastrous results on the Rock Creek Recreational Area and all of Fort Peck.

We encourage limiting the lowest draw down to 2220. Development of the area into a Recreational Destination Point can only occur with the higher pool level.

Sincerely,

Art Gehnert

Art Gehnert
President
Rock Creek Cabin
Association

ARTHUR A. LINK
2001 Grimsrud Drive
Bismarck, North Dakota 58501

October 7, 1993

The Honorable Max Baucus
Chairman, U.S. Senate Committee
on Environment and Public Works
511 Senate Hart Building
Washington. DC 20510

Dear Senator Baucus,

North Dakota Senator Kent Conrad has invited me to participate in the oversight hearing you and your Committee are conducting regarding the Army Corps of Engineers Missouri River Master Water Control Manual.

I appreciate the opportunity to submit the following statement for the record:

In 1953, when the Garrison Dam was closed and the impoundment of waters filled Lake Sakakawea, it dissected the Fort Berthold Indian Reservation into five segments, submerged the town of Elbowooods, requiring the relocation of hundreds of Native Americans from their ancient homelands including the re-interment of Indian remains. It destroyed the towns of Sanish and Van Hook and inundated a half-million acres of land including the fertile river bottom land and thousands of acres of native wood lands and grass lands. It displaced countless established farm and ranch units, many existing since homestead days. In fact, "it is a flood that came and stayed."

The original provisions of the Pick-Sloan plan called for diversion of Missouri River waters to central and eastern North Dakota for the beneficial uses that, to some degree, was supposed to mitigate for our state the negative impact of the half million acres flooded by the reservoir.

Garrison Dam is one of six mainstream dams on the Missouri River for the purpose of providing flood control, navigation, hydro-electric power, irrigation, and recreation. North Dakota has patiently waited forty years for Congress to honor its' commitment to complete the now modified Garrison Diversion Project. In the course of these forty years a recreation and fishing industry has developed on Lake Sakakawea of significant economic importance to our state. The unusual draw down of the Lake during recent drought years, to sustain navigation downstream, created a devastating

impact upon this new industry. Marine and resort facilities were left high and dry. The reservoirs upstream are available for maximum storage in high water years for the protection and benefit of down stream users. Therefore, in years of drought and low flows of water, fairness dictates that down stream uses should be curtailed in deference to the needs of upstream states. Without the contribution of storage reservoirs by upstream states, with accompanying negative impacts, the entire river basin control system could not exist.

It is therefore incumbent upon the Congress and the Corps of Engineers to re-evaluate and update the Missouri River Master Control plan to the end that upstream states that have given so much will not suffer the intolerable consequences of the past several years of low water storage.

Thank you for the opportunity to submit my views.

Sincerely,

Arthur A. Link

Arthur A. Link
North Dakota House of Representatives 1947-'71
United States House of Representatives 1972-'73
Governor of North Dakota 1973-'81

STATEMENT
William R. Mills
October 1, 1993

The examination of the priorities of flow control of the Missouri River require both reference to the past and to the future.

In the past the flow was controlled to prevent flooding downstream from the Dakotas but allowed deliberate flooding of the Dakotas.

For example, the Missouri River Inter-Agency Commission determined it was dangerous to release over 15,000 cubic foot a second under ice cover. So winter releases are still thus curtailed at the Nebraska line. This protects the people downstream from the Dakotas.

However, winter releases under ice cover of 30,000 cubic feet per second which are made, but contained in the Dakotas, cause a great deal of damage to the Dakotas. Between Garrison Dam and Bismarck seventy acres of privately owned high, dry land each year is washed away. And as the General Accounting Office found in their investigation, the Missouri at and below Bismarck is becoming a wide, shallow water body with many sand bars. What the high water flows scours off the bottom and washes off the shores flows downstream to Bismarck where the current diminishes due to the backwater effect from the Oahe Reservoir. (GAO, Water Resources, March 1988)

Releases at the Nebraska border are high in the summertime to provide downstream states with a nine foot deep, three hundred foot wide, channel. These releases make hydro power in the summertime. (9 Oct 89, Senate Subcommittee on Water and Power, p. 242)

But in the wintertime, hydro power is made in the Dakotas by the tremendous releases that drain Garrison Reservoir each winter.

To appreciate the problem, reference to the past is significant. In 1950 the Corps wanted for Oahe Reservoir all the land to the Bismarck-Mandan Memorial Bridge. In 1954 Senator Young made the Corps move the taking line 11.2 miles downstream from the bridge.

However, the Corps would flood private land and get it wet and then call it wetland and then claim jurisdiction. They would not let you protect it. But the courts in the Fort Pierre case held that the Corps could not acquire jurisdiction in this dubious manner.

Meanwhile the Corps was flooding land in the 11.2 mile area below the Bismarck-Mandan Memorial Bridge. So two corporations, who owned most of the private waterfront in that area, brought an action in the United States Court of Claims in 1981. That court was just below the United States Supreme Court, and its judges were the most prestigious and had lifetime terms.

The United States Justice Department always represented the defendant, the United States. But United States Attorney General Ed Meese did not like litigation in an independent court. The prestigious United States Court of Claims was trashed and in its place the Claims Court was formed. These new judges needed approval every few years, which means their selection and tenure would be controlled by the lawyer for the defendant in all the cases.

But about 1984, after the Fort Pierre decision, the Corps didn't want to rely on Ed Meese and they announced they were

buying six thousand acres of land at Bismarck so they could keep flooding it.

In came Congressman Byron Dorgan who called in the Corps and met with all the affected people. When he got through, the Corps was back to where Senator Young had left them thirty years earlier.

But during the hearings Congressman Dorgan had ordered the Corps to make a report on what they were doing and by what authority. The federal constitution is different from the state's and under the United States Constitution, only Congress can authorize the taking of private property for public use and Congress had not approved.

Meanwhile, in the Claims Court, Anchor Estates and Dakotaville had the studies and records under subpoena. Ed Meese's Justice Department ordered the records and report destroyed. Dorgan ordered the report produced.

The Corps found itself between a rock and a hard place, so they destroyed all the records and all copies of the report, except two copies of the report sent to the North Dakota State Water Commission to appease Dorgan. I stole one.

In the Claims Court I applied for an order that the Attorney General be required to show cause why he should not be punished for contempt of court for destruction of evidence that was under subpoena.

But no one ever said Ed Meese was not cunning.

On February 11, 1987, three things happened.

I. Ed Meese advised the President that even though both houses of Congress had voted against the raise, they did not do it right and every Senator and every Congressman and every

Federal Judge got a raise. Judge Yok, who would have to rule on Ed Meese and accomplices' contempt, got $10,000 a year extra.

II. Judge Yok threw out the cases of Anchor Estates and Dakotaville and ruled the contempt was thereby moot. (It can't be murder because the victim died.)

III. Senator Burdick held a hearing of a United States Senate Subcommittee in Bismarck that day, where I and many others testified. Senator Burdick then called on the General Accounting Office for an investigation.

While the case was appealed to a clever little appeals charade created with the "Claims Court", they held against Dakotaville and Anchor Estates. They got a raise, too. But an unusual thing happened. They ordered that their written opinion in this case not be published.

So forward went the landowners with a Petition to the United States Supreme Court for a Writ of Certiorari. Writ denied. (Petition for Certiorari, Anchor Estates vs. U.S.)

As is pointed out, currently on television, these petitions are reviewed by young law clerks graduated and adjusted at prestigious schools, who summarize petitions for eight of the nine judges. The news reports express some question as to the high number of writs granted in titillating dirty words cases. No one seems confused that cases giving judges money are not recommended for review and reversal.

SUMMARY

For many years the law had been that, on navigable rivers, the United States had a flowage easement up to the ordinary highwater mark. No one questions the right to flood to this level.

The Army Corps of Engineers has studied and pronounced that this ordinary high water mark is reached at Bismarck on an open river discharge from Garrison dam of 20,000 cubic foot a second. Any release in excess of this amount floods private property which would be a taking not authorized by Congress. This is not permissible.

The Missouri River Master Water Control Manual should adjust itself to legality. Any planned deviation would constitute a criminal conspiracy. Not unusual, but not appropriate.

So what is the solution and what should the manual provide?

I. No releases from Garrison Dam should be made in excess of 20,000 cubic feet a second and water releases under ice cover should not exceed 15,000 cubic feet a second.

II. If there is excess water, do Garrison Diversion as the white man promised many moons ago when they flooded the best farm land except for the Red River Valley.

III. If there is still more water to release, get out the old Panama Canal Kit and dig out the channel at Bismarck. We are entitled to as much consideration as Bob Dole's Kansas and more consideration than unwed mothers and Russia.

William R. Mills
2904 Langer Lane
Bismarck, ND 58504

Oglala Sioux Tribe

Box H
Pine Ridge, South Dakota 57770
(605) 867-5821
Fax: (605) 867-1004

JOHN YELLOW BIRD STEELE
President

MEL V. LONE HILL
Vice President

THERESA TWO BULLS
Secretary

MELVIN CUMMINGS
Treasurer

WILBUR BETWEEN LODGES
Fifth Member

Office of the President
JOHN YELLOW BIRD STEELE

October 26, 1993

The Honorable Max Baucus, Chairman
Senate Environmental and Public Works Committee
United States Senate - SD-456
Washington, D.C. 20510

Dear Senator Baucus:

The Oglala Sioux Tribe of the Pine Ridge Indian Reservation, South Dakota, respectfully requests that our statement be included in the record of the hearing conducted by your Committee in Glendive, Montana, on October 11th, 1993. The purpose of that hearing was to review the preparation of the Master Water Control Manual for the Missouri river, which is being prepared by the U.S. Army Corps of Engineers in Omaha, Nebraska.

Your hearing was timely. One week earlier, the Corps of Engineers had reviewed the preliminary draft Environmental Impact Statement for the Master Manual at a meeting in Omaha involving the federal agencies, states, and Indian tribes with interest in the Missouri River. The tribes of the basin have considerable rights, title and interest in the waters of the Missouri River, and the Oglala Sioux Tribe was represented in the Omaha meeting. The Tribes' rights are not being properly considered.

I have enclosed a statement on behalf of the Oglala Sioux Tribe that describes the particular concerns of my tribe and its membership. Your careful attention to these matters is important to us. It is now clear beyond question that the assistance of the Congress will be required to protect, preserve and restore Indian water rights in the Missouri River, its tributaries and the aquifers of the basin.

October 26, 1993

The Honorable Max Baucus, Chairman
Senate Environmental and Public Works Committee
Washington, D.C.

Page Two.

It is respectfully requested that the statement of the Oglala Sioux Tribe be included in the record of the Glendive hearing. It is my hope and that of my tribe that your Committee will hold additional hearings to address these crucial issues.

Sincerely,

OGLALA LAKOTA NATION

John Yellow Bird Steele
President

cc: file

STATEMENT OF JOHN STEELE, PRESIDENT
OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION

HEARING BEFORE THE SENATE COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS, OCTOBER 11, 1993

Attached to this statement is Resolution 93-160, dated October 20, 1993, of the Oglala Sioux Tribe from the Pine Ridge Indian Reservation, South Dakota (Appendix A). The Resolution rejects the *Review and Update of the Master Water Control Manual* for the Missouri River prepared by the Corps of Engineers because it fails to properly account for the *Winters* doctrine reserved rights of the Oglala Sioux Tribe and its membership and continues the long-standing policy of the Corps of Engineers and other federal agencies to diminish Indian *Winters* doctrine water rights and to force resolution of those water rights in state court adjudications. State court adjudications are an unacceptable forum to the Oglala Sioux Tribe. Moreover, negotiations with the States of Nebraska and South Dakota are unacceptable because the water necessary to full our rights is committed to non-Indians that have trespassed upon our prior and paramount rights. Good faith negotiations cannot be considered when non-Indians are in possession of the water supplies necessary to fulfill our *Winters* doctrine rights.

The Master Manual of the Corps of Engineers is rejected by the Oglala Sioux Tribe for the reason that it not only fails to preserve and protect the *Winters* doctrine rights of the Oglala Sioux and other tribes, it promotes and encourages continued reliance by federal agencies, states and private water users on Indian reserved water rights. The principle uses of Indian *Winters* doctrine water rights by federal agencies are for hydropower production on the mainstem Missouri River, barge traffic in the lower Missouri and Mississippi rivers and maintenance of habitat for environmental purposes, including endangered species. The failure of the Corps to properly account for *Winters* doctrine water rights of the tribes is underscored in the following underlying premise of the Master Manual:

> *...Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered. Future modifications to system operations, in accordance with pertinent legal requirements, will be considered as tribal water rights are quantified in accordance with applicable law and actually put to use. Thus, while existing depletions are being considered, the Study does not prejudice any reserved or aboriginal Indian water rights of the Missouri Basin tribes.* (PDEIS, Review and Update of Master Water Control Manual, Missouri River, Pg. 3-64).

The Oglala Sioux Tribe rejects this basic postulate of the Corps of Engineers in the Master Manual and denies that our rights are not prejudiced by the postulate. All conclusions by the Corps of Engineers respecting the availability of water for generation of hydropower, trafficking

of barges on the lower Missouri and Mississippi rivers, environmental enhancement, and protection of threatened and endangered species is predicated upon a denial that the Indian water rights exist unless they are not adjudicated ...*in an appropriate legal forum or by compact*... (PDEIS, p. 3-64).

It is repeated here for emphasis that all conclusions drawn by the Corps of Engineers (with respect to the 307 alternatives investigated in the preliminary draft EIS and the seven alternatives analyzed in greater detail) are invalid with regard to the amount of hydropower generation, water available for barge traffic, water available for environmental enhancement and water available for threatened and endangered species because the vested rights of the Indian tribes, including the Oglala Sioux, have not been taken in account whether those rights are decreed in an appropriate legal forum, compacted with a state, unadjudicated or not compacted with a state. The existence of the rights remains the same whether adjudicated, compacted, unadjudicated or uncompacted. The rights exist and are vested. Only the quantity of the water right is at issue. On the Pine Ridge Indian Reservation, investigations conducted by the United Sioux Tribes in 1979 disclose 670,500 irrigable acres within the reservation and an annual water requirement of 3.0 million acre feet. Thus, when compared with the natural flow of the Missouri River at Sioux City of 28.4 million acre feet annually, it is clear that the unadjudicated, uncompacted rights to the use of water of the Oglala Sioux Tribe are significant.

The Oglala Sioux Tribe is joining with other tribes of the Missouri River basin and across the Western United States to seek Congressional action to stop McCarran Amendment cases. McCarran Amendment adjudications in the states are apparently the ...*appropriate legal forum*... that the Corps of Engineers would suggest to the tribes for quantification of their valuable rights to the use of water. In the Missouri River Basin, McCarran Amendment cases are on-going or have been concluded in the States of Wyoming and Montana. In Wyoming the Wind River adjudication, involving the substantial water rights of the Arapaho and Shoshone Tribes, provides the example of the tragedy which befalls Indian tribes when their water rights are adjudicated in state courts, a process embraced by the United States Supreme Court in its interpretation of Congressional intent of a section of the 1953 Appropriations Act for the Department of Justice and other federal agencies known as the McCarran Amendment.

The decisions of the Wyoming Supreme Court in the Wind River decision were a travesty for the Indian people. Appendix B of this testimony summarizes the impacts of the Wind River decision. Basically, all rights of the Tribe were denied, with the exception of water currently used by Indians and non-Indians for irrigation on the Wind River Indian Reservation and future rights to develop approximately 50,000 acres with an annual water requirement of approximately 188,000 acre feet. The tribes were denied rights to ground water, water for aesthetic purposes, water for industry and minerals, water for forests and water for fish and wildlife preservation. The Wyoming Supreme Court denied these rights of the Arapaho and Shoshone Tribes, despite recognition by the United States in the Treaties of 1851 and 1868 that the tribes possessed a vast

territory, part of which would be made available to the United States and its citizens and the remaining part of which would be made into a permanent tribal homeland with the preservation of sufficient resources to sustain a viable economy and environment for the tribe and its membership. The potential for developing this viable economy and preserving the environment was stripped away by the Wind River decision.

Also in Appendix B the actions of the United States Supreme Court in reviewing the Wind River case are presented. Of particular concern to the Oglala Sioux Tribe is the fact that the United States Supreme Court was willing to hear the issue of *sensitivity*. For over a century, non-Indians have trespassed upon Indian water rights, including those of the Wind River, Arapaho and Shoshone Tribes. In the closing days of the 20th century, the United States Supreme Court is apparently more concerned that non-Indian trespassers will be treated with sensitivity when Indian water rights are adjudicated than preserving the rights of the tribes. Apparently there is concern that, even though the tribes' rights are severely diminished, there is potential for affecting non-Indian trespassers that are relying on those diminished rights. Shockingly, the United States Supreme Court not only heard the issue of sensitivity, the highest Court in the land reached a tie vote on the issue. Had one more Justice voted against the tribes, all tribes of the Nation would now be subjected to a test of whether our prior and superior rights to the use of water infringe upon non-Indian water users that have trespassed upon our water rights.

There is a need for reform. Congress must take action to protect the Oglala Sioux and other tribes of the Missouri River Basin from the barbarous treatment of the state courts and from the desire of the United States Supreme Court to confirm the will of the state courts. It is urged here that Congress consider a moratorium on McCarran Amendment cases now proceeding or expected to proceed in the Western States. These cases are not only systematically destroying Indian water rights, they are destroying the dignity of the Indian people and the dignity of those throughout the Nation that seek justice, rather than judicial desparation, in the solution of our problems.

The Corps in the Master Manual ignores Indian water rights and directs the tribes to...*an appropriate legal forum*... The Oglala Sioux deny that McCarran Amendment cases are ...*an appropriate legal forum*... By forcing the tribes to have their water rights adjudicated or settled by compact, the Corps encourages the federal agencies to continue to rely on Indian water for the generation of hydroelectricity at the mainstem dams, encourages the downstream states to continue to rely on Indian water for the maintenance of barge traffic, places false reliance on Indian water rights for enhancement of the environment, and founds the protection of threatened and endangered species upon Indian water.

If not adjudicated in an appropriate legal forum, the Corps suggests that the tribes can determine their water rights by *compact*. The Oglala Sioux Tribe rejects the proposition that a proper determination of our reserved rights can be made by negotiated settlement resulting in a compact with the States of Nebraska or South Dakota.

In Montana, the process of negotiated settlement is on-going. Compacts have been developed between the State of Montana and the Fort Peck Tribes and between the State of Montana and the Northern Cheyenne Tribe. In the former case, the State of Montana has no interest in the outcome of the compact. The Fort Peck Indian Reservation is located at the downstream border of Montana. The citizens of the State are not disadvantaged in any manner by whatever agreement the tribes and the State enter into. But it is immoral for the State of Montana to reach agreement with the Fort Peck Tribes that places greater burden on the downstream tribes (of which there are many) to derive their *Winters* doctrine rights from a limited supply with greater competition from non-Indians. The Oglalas support the Sioux and Assiniboine Tribes of the Fort Peck Indian Reservation as to the quantity and nature of their rights to the use of water. But the Oglala Sioux Tribe cannot accept the arbitrary and capricious settlement tactics of the State of Montana, because they affect us.

Foremost in the settlement process in the State of Montana is the threat of litigation. All tribes in the State have been sued by Montana in a purported McCarran Amendment lawsuit. With the lawsuit as leverage, the State offers negotiated settlement. The negotiated settlement invariably is founded upon the preservation and protection of the state-created water rights of non-Indians that have trespassed upon the vested rights of the tribe. This foundation is harsh. The tribes know that state court adjudication will result in a Wind River-like decision or worse. Settlement may not be attractive to the Montana tribes, but it is more attractive than the indignity of a state decree sharply diminishing the rights of the tribes. It is believed by the Oglala Sioux Tribe that history will condem the forced-negotiation package of the State of Montana. This is particularly true when considering the fact that the State of Montana expects to diminish the Indian reserved rights to the use of water to such an extent that the State itself can reserve water for future non-Indian purposes. The Governor of Montana has written the Corps of Engineers asking that the reserved water rights of the State of Montana be considered in the analysis of the Master Manual.

The Oglala Sioux Tribe resides on the Pine Ridge Indian Reservation, largest of the remnants of the Great Sioux Reservation. The Great Sioux Reservation was created from a part of the area recognized by the United States in the Treaty of 1851 as Sioux territory. Sioux lands in 1851, according to the United States, extended well south into Nebraska, west along the Platte River in Colorado and Wyoming, to the Powder River in Montana and to the Heart River in North Dakota. The territory extended past the Missouri River on the east. In 1868, the United States entered into a treaty that established the Great Sioux Reservation as all of South Dakota west of the east bank of the Missouri River. In 1889, Congress broke apart the Great Sioux Reservation into nine smaller parts, of which the Pine Ridge Indian Reservation is one. The six principle water sources of the Great Sioux Reservation were the Missouri River, Grand River, Morreau River, Cheyenne River, White River and the Ogallala Aquifer. The *Winters* doctrine water sources of the Pine Ridge Indian Reservation include the Cheyenne River, White River, Ogallala Aquifer and Missouri River. Congress has authorized our diversion from the mainstem Missouri River in Public Law 100-516, the Mni Wiconi Rural Water Project Act.

The water supplies necessary to fulfill our *Winters* doctrine rights on the White and Cheyenne Rivers are being utilized by the Whitney Irrigation Project in Nebraska and the Angostura Federal Reclamation Project in South Dakota, respectively (Appendix C). Those projects, among numerous smaller projects, dominate the use of those streams. The remaining water supplies are so erratic and so poor in quality that the Oglala Sioux Tribe finds them unfit for use. Until such time as the United States can restore the rights of the Oglala Sioux to those streams, the tribe must derive its water supplies from the Missouri River and the Ogallala Aquifer. Because the United States has undertaken or assisted in the developments that have diminished our water supplies on the White and Cheyenne Rivers, the Oglala Sioux Tribe is entitled to a replacement supply from the Missouri River. The best use of the replacement supply of the Oglala Sioux Tribe is in the production of hydropower at the mainstem dams, in the support of barge traffic, in environmental enhancement, in protection of endangered species and for other mainstem purposes. Therefore, the Oglala Sioux Tribe claims rights, title and interest in the water used by the United States for these purposes. The Master Manual of the Corps of Engineers does not distinguish between the water rights of the Oglala Sioux Tribe in the Missouri River and the surplus waters of the United States. By failing to distinguish between the Oglala waters and the surplus waters of the United States, there is no separation of the benefits totaling $1.277 billion annually into those produced by the respective owners. It is the desire and intent of the Oglala Sioux Tribe to participate in the benefits of the Missouri River Basin project in accordance with the Oglala contribution of water supply, albeit a replacement supply.

The Oglala Sioux Tribe and its membership seeks the development of a sound policy by the Congress of the United States that will preserve, protect, restore and develop the water resources and water rights that we possess in the Missouri River, its tributaries and its aquifers. As presented earlier in this testimony, the practices of the states in arriving at decisions respecting the nature and extent of the *Winters* doctrine water rights of the tribes are barbarous and must be discontinued. We are confident that, in a period when the nation has resolved its differences with the world superpowers, attention can be directed to internal matters. The proper resolution of the water rights of the Oglala Sioux and other tribes of the Missouri River Basin is one of the most important tasks that could be undertaken by Congress and one that is needed to avoid the travesty brought by McCarran Amendment cases, which travesty was given impetus by the Corps of Engineers in its Master Manual.

APPENDIX A

RESOLUTION NO. 93-160

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION OF OGLALA SIOUX TRIBAL COUNCIL REJECTING THE MISSOURI RIVER MASTER MANUAL.

WHEREAS, the Oglala Sioux Tribe has valuable Winters Doctrine reserved water rights in the Cheyenne River, White River, Little White River, High Plains Aquifer, Tributaries to the aforementioned water sources and to the Missouri River, and

WHEREAS, the reserved water rights of the Oglala Sioux Tribe and its membership stem from treaties with the United States, including, but not limited to, the Treaties of 1851 and 1868, and

WHEREAS, federal agencies, such as the Bureau of Reclamation and Corps of Engineers, after the U.S. Supreme Court decision in the Winters Case in 1908 and before the enactment of the 1944 Flood Control Act, which approved the Missouri River Basin Pick-Sloan program, developed the Milk River Project, Fort Peck Dam, St. Mary's River diversion, International Boundary Water Treaty between Canada and the United States and other projects throughout the Missouri River Basin and Western States that ignored the prior and superior rights tot he use of water by the Indian tribes, including the Oglala Sioux Tribe. These water projects benefitted non-Indians to the detriment of the Indian tribes, for they relied upon the unused reserved water rights of the Tribes, and

WHEREAS, agents of the United States, including the Secretary of the Interior, did not take steps to protect and preserve the tribes Winters Doctrine reserved rights to the use of water and supported projects, such as the Whitney Irrigation District, which utilizes the dependable flow of the White River in Nebraska and relies on the unused reserved water rights of the Oglala Sioux Tribe to the detriment of the Oglala Sioux Tribe, and

WHEREAS, with the approval of the Missouri River Basin Pick-Sloan program by Congress in the 1944 Flood Control Act, the Indian tribes of the Missouri River Basin, including the Oglala Sioux Tribe, were assured and were confident that part of their Winters Doctrine reserved water rights would be developed for the benefit of the Tribes as evidences by the letter of the Office of Indian Affairs dated April 26, 1944,

> "In so far as the Indian irrigation and power interests are concerned, the report (Senate Document 191) seems to give them adequate consideration..." (William Zimmerman, Jr., Assistant Commissioner.)

The Pick-Sloan Plan itself contemplated that the Indian tribe would be involved in the benefits of the Missouri River Basin-Sloan program.

> "Present and future plans of state agencies and of various government agencies such as the Indian Service, the Fish & Wildlife Service, the National Park Service, and the Bureau of Reclamation, as well as the War Department, Department of Agriculture, and the Federal Power Commission should be coordinated, in order to avoid the waster incident to conflicting plans and duplication of effort, in an order to gain the advantages of large-scale, coherent works, and operations." (Senate Document 191, 78th Congress, 2nd Session, pg. 18), and

WHEREAS, the Cheyenne River is the largest tributary of the Missouri River in South Dakota and a Winters stream of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation. Prior to and following the Pick-Sloan Plan, the Cheyenne River was developed for the benefit of non-Indians and Oglala components of the project were never developed,

> "The Cheyenne River is the largest tributary of the Missouri in South Dakota. The Bureau of Reclamation has already developed the Belle Fourche project on the Belle Fourche River, the northern tributary of the main Cheyenne, and private developments have added another 12,000-15,000 acres along the tributaries of the Belle Fourche River, adjacent to the Black Hills. The Rapid Valley project is now under construction by the Bureau of Reclamation, and after the 16,000 acre-foot Deerfield Reservoir and one additional reservoir yet to be selected have been constructed, a supplemental water supply for 12,000 acres in the Rapid Creek Valley will be furnished. The Belle Fourche project was originally planned for approximately 80,000 acres, but run-off during the past 12 years has proved to be an inadequate supply for so large an acreage. By the construction of the Keyhole reservoir of 276,000 acre-foot capacity, the water supply for the Belle Fourche project will be so stabilized as to permit its final acreage to be maintained at approximately 45,000 acres. One other reclamation project has been authorized, namely, the Angustora Reservoir with a capacity of 160,000 acre-feet, water can be supplied by gravity to a 16,000 acre project in the vicinity of Hot Springs, S.Dak and to 25,300 acres in 49 scattered pumping units along the lower reaches of the river and 5,030 acres along the lower Belle Fourche River. A reservoir of 45,000 acre-foot capacity on

Beaver Creek in Wyoming, will furnish a water supply for 8,000 acres in the Edgemont project along the Cheyenne River, all of which lies in South Dakota above the Angostura project...." (Senate Document 191,pg.76), and

WHEREAS, recognizing the dominance of the Whitney Irrigation project with water right inferior to those of the Oglala Sioux Tribe, the Pick-Sloan Plan contemplated the development of irrigation on the Pine Ridge Indian Reservation from the White River.

White River rises in low hills of western Nebraska, and flows northeastward into South Dakota, to a confluence with the Missouri River about 15 miles downstream from Chamberlain, S.Dak. All of the water resource the White River rising in Nebraska have already been utilized by the Whitney irrigation district, an area of some 10,000 acres, served by an inland reservoir of 1,500 acre-foot capacity. A supply canal for this reservoir diverts a spring flow in the White River, which is remarkable uniform throughout the year. In South Dakota, the remaining watershed produces an exceedingly erratic run-off with high discharge from summer rainstorms, which fall on the prairie area and on a large area of shale badlands that produce quick and heavily silt-laden run-off. A reservoir of 70,000 acre-foot capacity at the Rockyford site, about 25 miles upstream from the town of Interior (Pine Ridge Indian Reservation) will furnish an adequate water supply for 42,000 acres of small units, scattered from the reservoir site to the mouth of the river, all of which must be served by pumps. Power to operate the pumps would be imported into the Basin. The available water supply will serve less than half of the total area of land in the Basin which is adapted to irrigation" (Senate Document 191, pg.77), and

WHEREAS, it is apparent that Pick-Sloan promised considerable development on the Pine Ridge Indian Reservation for the benefit of the Oglala Sioux Tribe and its membership, and said development was never undertaken for the reason that non-Indian developments with state-created water rights, inferior to the prior and superior reserved rights of the Oglala Sioux Tribe, had been developed or would be developed and would monopolize the dependable water supplies of the White River and its tributaries and the Cheyenne River and its tributaries, and

WHEREAS, there was no effort by the Bureau of Reclamation or the Corps of Engineers to develop the water supplies of the Pine Ridge Indian Reservation for the benefit of the Oglala Sioux Tribe

or its membership prior to or following the Pick-Sloan Plan, although such development was contemplated by the plan and by the tribe. In developing non-Indian water projects, the Bureau of Reclamation and the Corps of Engineers have refused to acknowledge the vested water rights of the Oglala Sioux Tribe and other Missouri River Basin tribes through statements similar to the following,

> "The parties to this contract acknowledge that American Indian tribes claim prior and paramount right to the use of large quantities of water within the Missouri River Basin. Accordingly, this agreement is subject and subordinate to any claims of the Missouri River Basin tribe for reserved rights to the use of water which are adjudicated and which have been found to constitute a prior right by a final and non-appealable order of a court of competent jurisdiction." (Emphasis supplied, Department of Interior, December 9, 1982, Environmental Impact Statement on Industrial Water Services, Yellowtail (Big Horn) - Boysen Reservoirs, Draft Environmental Statement, DES 82-77).

Rather than coordinated planning to avoid the waste of conflicting plans (contemplated by the Pick-Sloan Plan), the Bureau of Reclamation and Corps of Engineers have refused to account for the prior and paramount rights of the Indian Tribes and have forced the Indian tribe to adjudicate their rights before considering those rights in planning and implementation of non-Indians projects. No such conditions have existed for non-Indian water development, which relies on state-created water rights that are inferior to the vested rights of the Indian tribes, including the Oglala Sioux Tribe. Adjudication of non-Indian water rights is not a pre-requisite for Bureau of Reclamation and Corps of Engineers planning, and

WHEREAS, Resolution No. 93-159 of the governing body of the Oglala Sioux Tribe outlines the fact that the only available forum for the adjudication of Indian water rights is state court. The Oglala Sioux Tribe find that submission of its water rights to state court adjudication is unacceptable. Likewise, the Tribe finds that settlement of Indian water rights under duress, which is the circumstance to which the Indian tribes are subjected to when sued by the states for adjudication of the Tribes Winters Doctrine water rights is unacceptable, and

WHEREAS, the Corps of Engineers was sued by the States of Montana, North Dakota and South Dakota for the purpose of seeking greater benefits for the Upper Missouri River Basin states as contracted with the Lower Missouri River Basin states. The

litigation by the Upper Basin states has caused (1) Congress to hold hearings on the operation of the Missouri River, (2) the Clinton administration to take active involvement to ensure that all federal agencies have adequate input in the planning process related to revising Missouri River operations, and (3) the Corps of Engineers to embark on a formal review and revision of its Master Water Control Manual for the Operation of the Missouri River, and

WHEREAS, the Corps of Engineers has completed a preliminary draft environmental impact statement on the Review and Upgrade of the Master Water Control Manual for the Missouri River. The preliminary draft environmental impact statement examined over 300 alternative for operation of the Missouri River Main-Stem Reservoirs involving permanent pools ranging from 18 to 48 million acre-feet, alternative navigation service level criteria for winter, spring/fall, and summer seasons, and current and modified intrasystem regulation. None of the alternatives considered by the Corps of Engineers in its Master Manual Review and Update take into account the prior and paramount reserved water rights of the Indian tribes, thereby continuing the pattern since 1908 and since 1944. The Corps of Engineers dismisses the vested water rights of the Oglala Sioux Tribe as follows:

> The Missouri River Basin Indian Tribes are currently in various stages of quantifying their potential future uses of Mainstream System water. It is recognizes that these Indian tribe may be entitled to certain or aboriginal Indian water rights in streams running through and along reservations. Currently, such reserved or aboriginal rights of tribal reservation have not been quantified in an appropriate legal forum or by compact with three exceptions - the rights embodied in the Compacts between Montana and the tribes at the Fort Peck Reservation (awaiting Congressional approval), between Montana and the tribes in the Northern Cheyenne Reservation (awaiting results of Tribal Referendum) and the settlement for the Wind River Reservation in Wyoming...."
>
> "....Study considered only existing consumptive uses and depletion; therefore, no potential tribal water rights were considered. Future modifications to system operations, in accordance with pertinent legal requirements, will be considered as tribal water rights are quantified in accordance with applicable law and actually put to use. Thus, while existing depletions are

being considered, the Study does not prejudice any reserved of aboriginal Indian water rights of the Missouri River Basin Tribes." (PDEIS, Review and Update of Master Water Control Manual, Missouri River, pg. 3 - 64), and

WHEREAS, the review and update of the Master Control Manual is a continuation of practices by the agencies of the United States from 1908 when the Winters Doctrine was announced to present, during which time the federal agencies have ignored the Winters Doctrine, encouraged non-Indian water users to develop state-created water rights without coordination with prior and superior Indian water rights and with the result of producing conflicts between the Indian reserved rights and inferior state-created water rights. The Corps of Engineers does prejudice the reserve rights of the Oglala Sioux Tribe and other Missouri River Basin tribes by continuing to ignore the Winter Doctrine reserved rights of the tribes until adjudication of those rights in state courts, which forum is rejected by the Oglala Sioux Tribe as set out in Resolution No. 93-159, and

WHEREAS, by failing to consider the Winters Doctrine rights of the Missouri River Basin Tribes, including the Oglala Sioux Tribe, the Corps of Engineers continues to produce national economic benefits for flood control, hydropower, water supply, recreation and navigation purposes totalling as much as $1.285 billion annually (PDEIS, pg. 5-265), which benefits rely upon unused reserved water rights of the Oglala Sioux and other tribes of the Missouri River Basin and which benefits are not realized by the Oglala Sioux Tribe, and

WHEREAS, the greatest benefit of the Missouri River Basin Pick-Sloan is the generation of hydropower, which accounts for approximately 1/2 of the total annual economic benefits. Hydropower benefits to the agencies have suppressed the development of the Indian Winters doctrine water rights and now rely upon unused Winters doctrine reserved water rights for the generation of electricity, and

WHEREAS, it is imperative that the Oglala Sioux Tribe proceed simultaneously with separate and joint initiatives with other tribes in the Missouri River Basin to reject the Review and Update of the Master Water Control Manual of the Corps of Engineers and to seek Congressional Hearings in which the concerns of the tribes can be properly expressed. The object of the hearings would be to draft appropriate legislation that will preserve and protect the Oglala Sioux and other tribes Winters doctrine rights to the use of

water in the Missouri River, its tributaries and its aquifers and to permit the Oglala Sioux and other Missouri River Basin Tribes to participate in the benefits of the Missouri River Basin Pick-Sloan program, now

THEREFORE BE IT RESOLVED, that the governing body of the Oglala Sioux Tribe rejects the Review and Update of the Master Water Control Manual for the Missouri River prepared by the Corps of Engineers, for the reason that it fails to properly account for the Winters doctrine reserved rights of the Oglala Sioux Tribe and its membership and continues the long-standing policy of the Corps of Engineers and other federal agencies to ignore the tribes Indian Winters Doctrine Water Rights and to force resolution of those water rights in State Court adjudications, a forum unacceptable to the Oglala Sioux Tribe, and

BE IT FURTHER RESOLVED, that the governing body of the Oglala Sioux Tribe directs its President to take all appropriate action to file formal objections to the preliminary draft environmental impact statement, and

BE IT FURTHER RESOLVED, that the governing body of the Oglala Sioux Tribe directs its President to take all necessary steps to proceed separately and in concert with other Missouri River Basin Tribes, including the Mni Sose Inter-tribal Water Rights Coalition, to schedule hearings before the appropriate committees and subcommittees of the Congress of the United States for the purpose of expressing the deficiencies of the Master Control Manual and or the purpose of obtaining legislation that will require all federal agencies to properly address the tribes Winters doctrine reserved rights to the use of water and authorize and direct the appropriate federal agencies to ensure participation of the Oglala Sioux and other Missouri River Basin tribe in the benefits of the Pick-Sloan program, among other things.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned Secretary of the Oglala Sioux Tribal Council, hereby certify that this Resolution was adopted by the vote of: 12 for; 0 against; 0 abstain; 0 not voting; during a REGULAR SESSION held on the 20TH day of OCTOBER, 1993.

RESOLUTION NO. 93-160
Page Eight

Jocelyn Gibbons
JOCELYN GIBBONS
Recording-Secretary
Oglala Sioux Tribe

A-T-T-E-S-T

Mel V. Lone Hill
MEL V. LONE HILL
Vice-President
Oglala Sioux Tribe

APPENDIX B

RESOLUTION NO. 93-159

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL OF THE OGLALA SIOUX TRIBE TO TAKE ALL NECESSARY STEPS TO OBTAIN A CONGRESSIONAL MORATORIUM ON THE INITIATION AND PROSECUTION OF THE MCCARRAN AMENDMENT CASES, INVOLVING INDIAN WATER RIGHTS OF THE TRIBES.

WHEREAS, the McCarran Amendment was enacted by the Congress of the United States in an obscure section of the 1952 Appropriations Act for the Departments of State, Justice, Commerce and Judiciary. A Section of the Appropriations Act is known as the McCarren Amendment, for the reason that it was offered as an amendment to the 1952 Appropriations Act by Senator Pat McCarran from the State of Nevada. The McCarran Amendment is, in part, as follows:

> "SEC. 208 (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or in the process of acquiring water rights by appropriation under State Law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit. . . ." (43 USC 666, 1952), and

1981 U.S. Supreme Court Interpretation

WHEREAS, in 1981, the Unites States Supreme Court, in the case of Arizona v. San Carlos Apache Tribe, interpreted the McCarran Amendment as permitting the State Courts to determine the measure, nature and extent of Indian Water Rights in State Court adjudications:

> ". . . .we are convinced that, whatever limitation the Enabling Acts or Federal Policy may have originally placed on State Court Jurisdiction over Indian Water Rights, those limitations were removed by the McCarran Amendment. . . . the amendment was designed to deal with the general problem arising out of limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights. . . ." (463 US 545, p. 564), and

WHEREAS, U.S. Supreme Court Justice Stevens did not agree with the majority of the Supreme Court Justices and wrote as follows, further clarifying the interpretation of the U.S. Supreme Court:

> "To justify virtual abandonment of Indian Water Right Claims to the State Courts, the majority (of U.S. Supreme Court Justices) relies heavily on Colorado River Water Conservancy District, which in turn, discovered an

affirmative policy of federal judicial abdication in the McCarran Amendment. . . . Today the majority (of U.S. Supreme Court Justices) somehow, concludes that it (the McCarran Amendment) commands the Federal Court to defer to State Court Water Right Proceedings, even when Indian Water Rights are involved." (463 US 545, p. 573, et seq), and

McCarran Amendment Case at Wind River

WHEREAS, the interpretation of the McCarran Amendment, by the United States Supreme Court in Arizona v. San Carlos Apache Tribe, has been used by the States of Arizona, Washington, Montana and Wyoming to initiate State Court adjudications against Indian Tribes. Proceedings are continuing in the first three mentioned States, mainly Arizona, Washington and Montana. In Wyoming, the Wyoming Supreme Court has concluded the adjudication process and found as follows, regarding the Wind River Arapaho and Shoshone Tribes:

". . . .The Court, while recognizing that the tribes were the beneficial owners of the reservations' timber and mineral resources. . . .and that it was known to all before the treaty was signed, that the Wind River Indian Reservation contained valuable minerals, nonetheless, concluded that the purpose of the Reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish, does not alter that conclusion." (753 P.2nd 76, (WYO. 1988), p. 97-98)

". . . .The evidence is not sufficient to imply a fishery flow right absent a treaty provision." (753 P.2nd 76 (WYO. 1988), p. 98)

". . . .The facts that the tribes since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The District Court did not err in denying a reserved water right for mineral and industrial uses. . . ." (753 P.2nd 76, (WYO. 1988), p. 98)

". . . .The District Court did not err in holding that the Tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation that would justify finding this to be a purpose for which the reservation was created or for which water was impliedly reserved. . . ." (753 P.2nd 76 (WYO. 1988), p. 99)

> ". . . .The District Court did not err in deciding there was no reserve groundwater right." (753 P.2nd 76, (WYO. 1988, p. 99-100), and

WHEREAS, the history of the case shows that the United States Department of Justice and the Wyoming District Court reduced the Tribes' claims for irrigation from 490,000 arable acres to the decreed amount of 48,097 acres of land, not presently irrigated that require approximately 188,000 acre feet annually for the irrigation of those future acres, and

Review of Wind River Case by U.S. Supreme Court

WHEREAS, the State of Wyoming petitioned the United States Supreme Court to consider whether Indian Water Rights should be confirmed, if (a) non-Indians are using water through State created water rights and (b) Indians cannot prove the need for the water reserved by them through Treaty or otherwise. The following question was posed to the United States Supreme Court:

> "In absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial State water rights, long in use on reservation, may reserved water right be implied for all practicably irrigable land within reservation set aside for specific Tribe?" (57 LW 3267 (October 11, 1988), and

WHEREAS, the United States Supreme Court did not prepare a written opinion on the question asked by the State of Wyoming. The United States Supreme Court, however, by tie-vote, confirmed that Indian Tribes may be awarded reserved water rights despite presence of substantial State water rights in use on the reservation. had the United States Supreme Court, however, had one additional justice voting in favor of the question raised by the State of Wyoming, it would now be necessary for the tribes to demonstrate the need for their implied reservation of water rights, if State created rights had been long in use on the reservation, and

WHEREAS, the Wind River Case demonstrates the hostility of the State Court and the willingness of a large number of United States Supreme Court Justices, to adopt State Court theories to the detriment of the Indian Tribes and the Tribes' Winters Doctrine reserved water rights, and

State Court is the Only Forum Available to
Tribes to Adjudicate Indian Water Rights

WHEREAS, in the States of Arizona and Montana, the United States Department of Justice is willing to take Indian Water Rights Cases into State Court, and the Tribes, in those, States have no other forum in which to adjudicate their water rights. Despite theories that a Federal Court forum is available, the practice of the Federal Courts is to yield to State Court jurisdiction, and

Water Settlements are Conducted
Under Duress and Adversely Affect
Downstream Tribes

WHEREAS, the United States has developed a Policy of Negotiation as the only alternative to tribes that have been sued by State Courts and whose water rights will be determined by State Courts. In the State of Montana, for example, the State Court adjudication process against an Indian Tribe, will be discontinued if the Indian Tribe is willing to negotiate with the State. Upon reaching a negotiation with the State, ratification by Congress of the United States is required. However, the Tribes in Montana, in Arizona and in Washington would not consider negotiated settlement of Indian Water Rights, in all cases, if they had not been forced into a State Court McCarran Amendment adjudication with predicted consequences comparable to the Wind River decision. Negotiations under these circumstances are being conducted under duress, and

WHEREAS, the water right settlements between the Indian Tribes and States, such as Montana , are detrimental to downstream Indian Tribes, such as the Oglala Sioux Tribe, for the reason that the settlements in upstream States affect the amount of remaining water supply in the Missouri River, its tributaries and its aquifers, needed to satisfy the Indian reserved water rights of the downstream tribes and the junior water rights of non-Indians. Water Right settlements in Montana are piecemeal, benefit the State of Montana and adversely impact downstream tribes, and

WHEREAS, the nature of the State Courts and the review of those cases by the United States Supreme Court is so unfavorable and the negotiation and settlement tactics, so unfair and detrimental that the Oglala Sioux and other Tribes of the Missouri River Basin require relief from the Congress of the United States, in the form of legislation that will place a Moratorium on McCarran Amendment cases or exempt Indian Tribes from McCarran Amendment cases, as the only means of protecting and preserving the reserved Indian Water Rights of the Tribes, now

THEREFORE BE IT RESOLVED, that the Governing Body of the Oglala Sioux Tribe directs the President of the Oglala Sioux Tribe to take all National steps to obtain a Congressional Moratorium on the initiation and prosecution of the McCarran Amendment cases, involving Indian Water Rights, and

BE IT FURTHER RESOLVED, that the Governing Body of the Oglala Sioux Tribe rejects the negotiation of Indian Water Rights, stemming from the initiation of McCarran Amendment cases designed to force Tribes to settle with States, such as Montana, which State has no regard for the affect of Montana settlements or downstream tribes, including the Oglala Sioux Tribe, and

BE IT FURTHER RESOLVED, that the President of the Oglala Sioux Tribe is directed to seek Congressional Hearings in the Missouri River Basin, in order to provide testimony before the appropriate committees or subcommittees of the Congress of the United States, with regard to the tragedy of the U.S. Supreme Court decision in Arizona v. San Carlos Apache Tribe, the Wind River Decision, the on-going cases in Montana, Arizona and Washington, the detrimental impact of water right settlements in Montana and the need for legislation to preserve and protect the reserved water rights of the Tribes, including the Oglala Sioux Tribe.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned Secretary of the Oglala Sioux Tribal Council, hereby certify that this Resolution was adopted by the vote of: 12 for; 0 against; 0 abstain; and 0 not voting; during a REGULAR SESSION held on the 20th day of OCTOBER, 1993.

Jocelyn Gibbons
JOCELYN GIBBONS
Recording Secretary
Oglala Sioux Tribe

A-T-T-E-S-T

Mel V. Lone Hill
MEL V. LONE HILL
Vice-President
Oglala Sioux Tribe

APPENDIX B

CONGRESS IS NEED TO STOP MCCARRAN AMENDMENT LAWSUITS THAT ADJUDICATE *WINTERS* DOCTRINE WATER RIGHTS

B.1 Pertinent Cases Describing *Winters* Doctrine

In British law announced in the Proclamation of 1763 by King George was a recognition of title to the land and resources reserved by the American Indians, including water. The *Winters* doctrine in 1908 announced the concept of the right of the Indian tribes to use water reserved by them, but the genesis of those rights in European, British and North American law can be traced backward through the centuries. The following is not a legal analysis of the *Winters* doctrine, but is a presentation of the basic concepts.

By 1832 the United States Supreme Court recognized the property rights of Indians in the classical case of *Worcester v. the State of Georgia*:

> *"America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors."* (6 P 515, p. 543)

> *"... This principle, suggested by the actual state of things was `that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments which title might be consummated by possession' 8 Wheat. 573.* (6 P 515, p. 543-44)

> *"... This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; <u>not one which could annul the previous rights of those who had not agreed to it.</u> It regulated the right given by discovery among the European discovers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on the denial of the right of the possessor to sell."* (6 P 515, p. 544) (Emphasis supplied)

"... This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not effect to claim; nor was it so understood." (6 P 515, p. 544-545) (Emphasis supplied)

The principles in the case of *Worcester v. Georgia* are similar in concept to the principles announced by the U. S. Supreme Court three quarters of a century later relating to the Yakima Indian Nation in the case of *United States v. Winans* (198 U.S. 371). Title of the Indians in their property rights was fully acknowledged.

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the Treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted." (Emphasis supplied).

Based on fact that the Indians were occupying smaller and smaller reservations from within their former lands, the Supreme Court case of *Henry Winters v. United States* (207 US 564) found that reservation of water for the purpose of changing the Indian people from a "pastoral" to a "civilized" people was implied in the establishment of the Reservation:

"The Reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be adequate with a change of conditions. The lands were arid and, without irrigation, were practically valueless."

"... The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be."

"... That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, [at Fort Belknap] and it would be extreme to believe that within a year

[when the state of Montana was created] Congress destroyed the Reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." (207 U S 574, p. 576-577).

These concepts were further advanced in the case of *Arizona v. California:* (373 U S 546).

"The Master found as a matter of fact and law that when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado [River] to irrigate the irrigable portions of the reserved lands. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet, to be used on around 135,000 irrigable acres of land." (373 U S, 546, page 596.)

"... It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind - hot scorching sands - and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." (373 U S 546, pages 598 and 599).

"We follow it [Winters] now and agree that the United States did reserve the water rights for the Indians effective as of the time and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act [Boulder Canyon Project Act] became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act. We also agree with the Master's conclusion as to the quantity intended to be reserved. He found that water was intended to satisfy the future as well as present needs of the Indian reservations. ...We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the Reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable." (373 U S 546, pp 600-601)

The case of *United States v. Ahtanum Irrigation District* (236 Fed 2nd 321, 1956) applied the *Worcester - Winans - Winters* concepts on Ahtanum Creek, tributary to the Yakima River and northern boundary of the Yakima Indian Reservation:

"The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as contemplated in the year 1915 would take substantially all of the waters of Ahtanum Creek. It does not appear that the waters decreed to the Indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our Conrad Inv. Co. Case, supra, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if

the amount awarded the United States for the benefit of the Indians in the Winters Case equaled the entire flow of the Milk River, the decree would have been no different." (236 F. 2nd 321, p. 327) (Emphasis supplied).

B.2 General Nature of Attacks on the *Winters* Doctrine

While the courts in the preceding excerpts stated the basic principles of Indian reserved water rights, the Congress, the Executive, the federal Judiciary at all levels, and the states are practiced in techniques of (1) limiting Indian reserved water rights, (2) suppressing development of those rights, and (3) permitting reliance by federal, state, and private interests on Indian reserved water rights that are not in use.

The Ahtanum Decision was favorable to the Yakimas, as shown at the end of the previous section, but it also addressed the practices of the government to diminish the *Winters* doctrine, a practice that extends to all branches of government (including the courts) and one that has become more focused over the decade of the 1980s:

"...With an opportunity to study the history of the Winters rule as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians. ... Viewing this contract as an improvident disposal of three quarters of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and Indian tribes. That history largely supports the statement: 'From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians.'" (236 Fed 2nd 321, p. 337)

B.3 McCarran Amendment is the Current Vehicle For Disposal of Indian *Winters* Doctrine Water Rights

In 1981, the McCarran Amendment was interpreted by the United States Supreme Court as subjecting Indian rights to the use of water to adjudication in state court systems. The following is the McCarran Amendment:

"SEC. 208 (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or in the process of acquiring water rights by appropriation under State law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit." (43 USC 666, 1952).

The U.S. Supreme Court case in *Arizona v. San Carlos Apache Tribe* permits state courts to determine the measure, nature and extent of Indian water rights. Historically, the states have sought to acquire and administer Indian property and rights thereto:

"... we are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on State Court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment ...the amendment was designed to deal with a general problem arising out of limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights ..." (463 U S 545, p. 564)

The *San Carlos* decision was unfavorable to the Indian tribes. To arrive at its decision, the U.S. Supreme Court found that Congress had used an appropriations act in 1952 to nullify the agreements between the United States and western territories that permitted statehood by the latter. In those agreements the former territories agreed that Indian matters would remain a federal responsibility. The title of the act was as follows:

"Making appropriations for the Departments of State, Justice, Commerce and the Judiciary, for the Fiscal Year Ending June 30, 1953, and For Other Purposes." (55 STAT 549).

The 1952 Act dealt primarily with salaries and expenses of government personnel. Sections 202 through 208 of the Act deal with general provisions of the Department of Justice:

"SEC. 202. Not to exceed $350,000 in the aggregate from the appropriations made in this title for the general administration, general legal activities and United States attorneys and marshals ...

SEC. 203. None of the funds appropriated by this title may be used to pay the compensation ...

SEC. 204. Sixty per centum of the expenditures for the offices of the United States attorney ...

SEC. 205. Appropriations and authorizations made in this title which are available for expenses of attendance at meetings shall be expended ...

SEC. 206. Appropriations and authorization made in this title for salaries and expenses shall be available for services ...

SEC. 207. None of the funds appropriated by this title may be used to pay the compensation ..." (66 STAT 549, pp. 559-560).

But in SEC. 208 (a) the McCarran Amendment was presented. It was this section that the U.S. Supreme Court interpreted the intent of Congress to reverse Indian policy agreed upon before Montana, South Dakota and other western states were granted statehood in the late 1880s. Even SEC. 208 dealt with matters of funding, bringing into question the intent of Congress waive to sovereign immunity in Indian water right adjudication, purportedly granted by SEC. 208 (a). SEC. 208 (d) was this:

"None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern Dis-

trict of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others. This title may be cited as the "Department of Justice Appropriations Act, 1953"." (66 STAT 549, p. 560). (Emphasis supplied).

The U.S. Supreme Court was not unanimous in the McCarran Amendment interpretation of the 1952 Appropriations Act. Justice Stevens concluded that the Court's interpretation went beyond the intent of Congress:

> *"To justify virtual abandonment of Indian water rights claims to the State Courts, the majority relies heavily on* Colorado River Water Conversancy District, *which in turn discovered an affirmative policy of federal judicial abdication in the McCarran Amendment. I continue to believe that* Colorado River *read more into that amendment than Congress intended ... Today, however, on the tenuous foundation of a perceived Congressional intent that has never been articulated in statutory language or legislative history, the Court carves out a further exception to the `virtually unflagging obligation' of Federal courts to exercise their jurisdiction. The Court does not - and cannot - claim that it is faithfully following general principles of law. ... That Amendment is a waiver, not a command. It* permits *the United States to be joined as a defendant in state water rights adjudication; it does not purport to diminish the United States' right to litigate in a federal forum and it is totally silent on the subject of Indian tribes' rights to litigate anywhere. Yet today the majority somehow concludes that it commands the Federal Courts to defer to State-Court water right proceedings, even when Indian water rights are involved."* (463 US 545, p. 573, et. sec.).

B.4 Western States Are Abusing the Purported McCarran Amendment Grant to Waive Sovereign Immunity In Indian Water Right Adjudication

The McCarran Amendment, an after thought to an appropriations Act in 1952 for the Department of Justice and other Federal agencies, was interpreted by the U.S. Supreme Court (as shown above) as the intent of Congress to remove the limitation on State Court jurisdiction to adjudicate Indian water rights. Since the *San Carlos* decision in 1981 (and the parallel case of *Northern Cheyenne*), the Federal District Courts and the Federal Circuit Court of Appeals have interpreted the case as virtual abandonment of Indian water rights to the State Courts. Both Arizona (*San Carlos* case) and Montana (*Northern Cheyenne* case) have initiated general water right adjudications for the purpose of diminishing the *Winters* doctrine rights of the Indian tribes in those states. In Montana, the following process is ongoing:

(1) The State of Montana sued all tribes in the State in a McCarran Amendment proceeding.

(2) The State of Montana established a Reserved Water Rights Compact Commission. The purpose of the Commission is to negotiate the *Winters* doctrine rights of the Montana tribes.

(3) The Department of Interior has adopted a negotiation policy for the settlement of Indian water rights. The U.S. Department of Interior has a negotiation team which works with the Montana Reserved Water Rights Compact Commission and Indian Tribes forced by an adjudication in State Court to negotiate.

(4) The Department of Interior makes all necessary funding available to the tribe willing to undertake negotiations. A tribe refusing to negotiate cannot obtain funding to protect and preserve its *Winters* doctrine water rights.

(5) Upon reaching agreement between the State of Montana and an Indian tribe, Congressional staff are assigned to develop legislation in the form of an Indian water rights settlement that may or may not involve authorization of Federal appropriations to develop parts of the amount of Indian water agreed upon between the Tribe and the State or for other purposes.

(6) In the absence of the desire of a Tribe to negotiate, the State of Montana proceeds to prosecute its McCarran Amendment case against the Tribe.

(7) The State of Montana, in a separate process, has reserved water to itself for future purposes based on projected water use by its citizens, despite the fact that the Doctrine of Prior Appropriation requires the use of water by an appropriator, and there can be no reservation of rights for a future purpose, except as diligent completion of a project for beneficial use.

The process (although not the details) in Arizona is basically the same. The process in both Montana and Arizona must be questioned for the reason that the settlement is reached by threat of the State to continue the prosecution of an adjudication against the Indian tribe. Therefore, the Tribe is forced to evaluate the merits of a settlement of its *Winters* doctrine water rights against the merits of a State Court proceeding against the Tribe to establish the its *Winters* doctrine water rights.

In the case of settlement, the Indian tribe has a guarantee from the United States that several million or several tens of millions of dollars will be added to the settlement process through Congressional ratification of the settlement and the authorization of Federal appropriations. Thus, the Tribe avoids a hostile State Court forum, arrives at an agreement to diminish its water rights claims and receives Federal funds to meet the needs of an Indian population with income levels well below poverty level. The process is hailed as a success by the States, the Federal agencies and the Congress. In fact, however, the duress under which the Tribes are proceeding will be analyzed harshly by history. Taking of Black Hills from the Great Sioux Reservation, taking of the Little Rockies from Fort Belknap and the taking of Glacier Park from the Blackfeet were no more unconscionable than the current process of negotiation.

Indian tribes are unwilling to subject their water rights to State Court adjudication due to a history of hostility in State Courts, as reflected most recently in the *Wind River* case. This case was prosecuted by the State of Wyoming following the 1981 Supreme Court case in *San Carlos*. The State of Wyoming sought to adjudicate the waters of the Big Horn Basin, the permanent home and abiding place of the Arapaho and Shoshone Tribes of the Wind River

Indian Reservation. The Tribes possessed valuable *Winters* doctrine water rights in the Big Horn River, its tributaries and the aquifers of that Basin. The outcome of the case was a tragedy for the Indian people. The case became the example that drives tribes to consider the negotiation policy adopted by the United States, Montana and Arizona rather than proceed in State Court in McCarran Amendment cases. The following summarizes the conclusions of the Supreme Court of the State of Wyoming in the *Wind River* case:

> *"The quantity of water reserved is the amount of water sufficient to fulfill the purpose of the lands set aside for the Reservation."* (753 P. 2nd 76, (Wyo 1988), p. 94).
>
> *"The Court, while recognizing that the Tribes were the beneficial owners of the reservation's timber and mineral resources ... and that it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless concluded that the purpose of the reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion."* (753 P. 2nd 76 (Wyo. 1988), pp. 97-98).
>
> *"The evidence is not sufficient to imply a fishery flow right absent a treaty provision."* (753 P. 2nd 76 (Wyo. 1988), p. 98).
>
> *"The fact that the tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The District Court did not err in denying a reserved water right for mineral and industrial uses."* (753 P. 2nd 76, (Wyo. 1988), p. 98).
>
> *"The District Court did not err in holding that the tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation which would justify finding this to be a purpose for which the Reservation was created or for which water was impliedly reserved."* (753 P. 2nd 76, (Wyo. 1988), p. 99).
>
> *"The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater. ... 'Whether the [necessary] waters were found on the surface of the land or under it should make no difference'. Certainly the two sources are often interconnected. ... Acknowledging the above, we note that, nonetheless not a single case applying the reserved water right doctrine to groundwater is cited to us. ... In* Colville Confederated Tribes v. Walton, *supra 547 F. 2d 42, there is slight mention of the groundwater aquifer and of pumping wells,* Id *at 52, but the opinion does not indicate that 'their wells' are a source of reserved water or even discuss a reserved groundwater right. ... the district court did not err in deciding there was no reserved groundwater right."* (753 P. 2nd 76, Wyo. 1988), pp. 99-100).

The only purpose for the Wind River Indian Reservation recognized by the Supreme Court of Wyoming was agricultural. The Arapaho and Shoshone had believed that the purpose of the reservation was to provide a permanent home and abiding place for their present and future generations to engage in pursuits of a viable economy and society. Despite oil and gas,

they were denied reserved water for mineral purposes. Despite the need for industry in a viable economy, they were denied reserved water for industry. Despite a tradition of hunting and fishing, they were denied reserved water for wildlife and aesthetic preservation. Despite the existence of a valuable forest, they were denied reserved water for forest purposes. Despite the existence of valuable fisheries established from time immemorial, they were denied a reserved water right to sustain their fisheries.

Efforts are on-going that may place further restrictions on the use of the waters decreed by the Wyoming District Court and affirmed by the Wyoming Supreme Court. The decisions of the Wyoming courts underscore the reasons that Indian tribes feel compelled to negotiate rather than subject their water rights to State Court adjudication inspired by the U.S. Supreme Court decision in *San Carlos*.

Most of the decisions listed by the Wyoming Supreme Court as set forth above are against the Indians. The denial of a reserved water right for groundwater is but one example of the presence of a will in State Court that departs from proper judicial consideration. To arrive at its opinion on groundwater, the Wyoming Supreme Court was inconsistent in its logic and relied upon factual errors. First, it is illogical that the Wyoming Supreme Court could acknowledge that an Indian reserved right should extend to both surface water and groundwater and then conclude that there was no reserved groundwater right. Second, the Court's research was inadequate at best, and did not reveal any cases in which a reserved groundwater right was granted. For the Court to base its denial of a groundwater right on its failure to find a reserved groundwater case requires careful review by the Tribes.

The Wyoming Supreme Court cited *Colville Confederated Tribes v. Walton* as a case that does not indicate that Indian wells were a source of reserved water or that a reserved right to groundwater was addressed in that case. Studying the *Colville* decisions shows clearly that groundwater was the subject of the case:

> "Because the surface water of No Name Creek has a hydraulic relationship with the underlying aquifer, these actions include rights to both surface and ground waters of the creek basin."... Using water diverted from No Name Creek and water pumped from an irrigation well drilled in the 1970's, Waltons are presently irrigation 105 acres. ... In 1975, the Tribe initiated an extensive irrigation project in the basin. Wells were drilled on the northern allotments to provide irrigation waters for the northern acres, and some well water was pumped into No Name Creek to serve the needs of the two southern allotments. ..." (460 F. Supp 1320 (1978), pp 1323 and 1324). (Emphasis supplied).

> "The Colville Confederated Tribes initiated this action a decade ago. They sought to enjoin Walton, non-Indian owner of allotted lands, from using surface and groundwaters in the No Name Creek basin. ... The No Name Creek is a spring-fed creek flowing south into Omak Lake, which has no outlet and is saline. The No Name Creek hydrological system, consisting of an underground aquifer and the creek, is located entirely on the Colville Reservation." (647 F. 2d 42 (1981)). (Emphasis supplied).

> "This dispute involves respective rights of the Colville Confederated Tribes (Tribe), Indian allottees and Walton to share in the water from the No Name Creek Hydrological System, which was originally reserved for the Tribe under the *Winter's* doctrine, when the Colville Reservation was created. ... The Tribe currently pumps water from the aquifer into No Name Creek during spawning season. ... No Name Creek is a spring-fed creek which originates on Allotment 892 and flows through Walton's allotments and the Indians' southern allotments into Omak Lake, a saline lake with no outlet. The creek and an underground aquifer underlying Indians' northern allotments and the northern tip of Walton's allotment, No. 525, constitute the No Name Creek Hydrological System." (752 F. 2d 397 (1985)). (Emphasis supplied).

Clearly, the U.S. District Court and Ninth Circuit Court of Appeals recognized Indian reserved water rights in the No Name Creek Hydrological System, that the No Name Creek Hydrological System included surface and underground waters and that the Colville Confederated Tribes pumped water from the underground waters into No Name Creek. The statement by the Wyoming Supreme Court that *Colville* does not discuss a reserved water right to groundwater is in error.

Because the petition for certiorari in the United States Supreme Court did not present the issue of groundwater, the ruling in the Wyoming Supreme Court denying a reserved water right to groundwater on the Wind River Indian Reservation was final within the boundaries of the State of Wyoming. Examination of the actions of the U.S. Supreme Court in the Wyoming case is also required by the Tribes:

> "The petition for writ of certiorari to the Supreme Court of Wyoming is granted limited to Question 2 presented by the petition." (109 S.Ct. 863 (1989)).

Question 2 of the petition from the Supreme Court of Wyoming was as follows:

> *"In absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on reservation, may reserved water right be implied for all practicably irrigable lands within reservation set aside for specific Tribe?"* (57 LW 3267 (October 11, 1988)).

The U.S. Supreme Court, limited its review to Question Number 2. Acting without a written opinion and deciding by tie vote, the U.S. Supreme Court affirmed the decision of the Supreme Court of the State of Wyoming that water may be reserved for an Indian Tribe, despite the fact that state water rights have been in use for a long time. The following argument by the State of Wyoming was not sustained by the U.S. Supreme Court, but a change in vote by a single justice would have reversed the decision and severely constricted the benefits of the *Winters* doctrine to the Indian people. The following is the statement of the sensitivity issue considered by the U.S. Supreme Court:

"The sensitivity doctrine takes its name from this passage:

> 'I agree with the court that the implied-reservation doctrine should be applied with sensitivity to its impacts upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law.' *United States v. New Mexico ...*

... There is strong indication that *New Mexico* does not apply to Indian reserved water rights ... The Ninth Circuit has nonetheless gleaned useful guidelines from it for use in Indian reserved water cases. ... It is thus not clear whether the sensitivity doctrine, requiring the quantification of reserved rights with sensitivity to the impact on state and private appropriators, applies here. ... Deletion of the upstream storage requirement which was intended to protect appropriators from sudden depletion by the diversion of water for the five future projects does not manifest insensitivity to other water users ... Nor does this court's elimination of 10% diversion reduction for future projects violate sensitivity doctrine. ... In the case at bar, the purpose of the reservation for which water is reserved is narrow - agriculture only. The right was quantified based on PIA - the master and the court rejecting some 50,000 acres originally claimed by the United States and the Tribes. The Indians' claim was further reduced by requiring an efficiency increase in historic lands. All of this evidences a sufficient sensitivity to the water needs of other water users. With the exceptions noted above we affirm the quantification of the reserved water right." *(753 P. 2nd 76 (Wyo. 1988), pp. 111 and 112).*

But with the Supreme Court of the United States within one vote of reversing a body of law protecting the tribes from the competition of states, the tribes are compelled to seek any alternative, including negotiation with a state, rather than proceeding in a McCarran Amendment adjudication in State Court. The question remains, however, of the validity and the propriety of a negotiation that requires the Tribes to settle their water rights under the circumstances prevailing in Montana and other western United States.

The decision in *Wind River* is limited to the State of Wyoming on critical issues, namely that Indian reserved rights do not apply to groundwater; the absence of a reserved water right for forest and mineral purposes; the absence of a reserved water right for fish, wildlife and aesthetic preservation; and the reduction of the Tribes' claims to irrigation from 490,000 to less than 50,000 acres. [1] The acreage of irrigation finally awarded to the Wind River Arapaho and Shoshone Tribes for future purposes was 48,097 acres involving approximately 188,000 acre-feet of water annually.

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1. In determining the Tribes' claims to practicability irrigable acreage, the United States (trustee for the tribes) began with an arable land base of approximately 490,000 and relied on its experts to arrive at over 88,000 *practicably irrigable acres*. The claim was further "trimmed" by the United States to 76,027 acres for final projects. The acreage was further reduced during trial to 53,760 acres by Federal experts with a total annual diversion requirement of about 210,000 acre feet. (Teno Roncalio, Special Master, In Re: The General Adjudication of All Rights to the Useof Water in the Big Horn River System and all Other Sources, State of Wyoming, concerning reserved water right claims by and on behalf of the Tribes of the Wind River Indian Reservation, Wyoming, December 15, 1982, pp. 154 and 157).

APPENDIX C

STREAMS OF THE PINE RIDGE INDIAN RESERVATION HAVE BEEN RENDERED UNUSABLE

The Pine Ridge Indian Reservation in the southwest corner of South Dakota relies upon the White and Cheyenne Rivers as sources of *Winters* doctrine rights to the use of water. The Whitney Irrigation project has dominated the flows of the White River since the 1920's. The Bureau of Reclamation wrote as follows in 1968:

> *"The Whitney Irrigation project, constructed in 1923 near Crawford, Nebraska, has an off-stream reservoir which initially had a capacity of 10,960 acre-feet for irrigation of about 10,000 acres....There are currently 37 direct-flow water rights on file for the White River in Nebraska, which total 115.1 cubic feet per second (c.f.s.) for approximately 8,060 acres of land....Stream flows of the White River have been over-appropriated for many years and are sufficient to satisfy water rights in Nebraska and South Dakota only during flood and high flow periods...."* (U.S. Bureau of Reclamation, Missouri-Oahe projects office, 1968).

The Pick-Sloan Plan acknowledged the development of the non-Indian Whitney Irrigation project on the White River in Nebraska and proposed a plan that would restore a dependable supply of water for the Pine Ridge Indian Reservation, but that plan and subsequent plans proposed by the Bureau of Reclamation were never implemented. The Pick-Sloan Plan provided as follows:

> *"White River rises in low hills of western Nebraska and flows northeastward into South Dakota, to a confluence with the Missouri about 15 miles downstream from Chamberlain, S.Dak. All of the water resources of the White River arising in Nebraska have already been utilized by the Whitney Irrigation District, an area of some 10,000 acres, served by an inland reservoir of 15,0000 acre-foot capacity. A supply canal for this reservoir diverts a spring flow in the White River, which is markedly uniform throughout the year. In South Dakota, the remaining watershed produces an exceedingly erratic run-off, with high discharges from summer rainstorms, which fall on the prairie area and on a large area of shale badlands, that produce quick and heavily silt-laden run-off. A reservoir of 70,000 acre-foot capacity at the Rocky Ford site [Pine Ridge Indian Reservation] about 25 miles upstream from the town of Interior, will furnish an adequate water supply for 42,000 acres of small units, scattered from the reservoir site to the mouth of the river, all of which must be served by pumps. Power to operate the pumps will be imported into the basin. The available water supply will serve less than half of the area of land in the basin which is adapted to irrigation."* (Senate Document 191, pg. 77).

Thus, it was well known by the Bureau of Reclamation and Corps of Engineers as they develop the Pick-Sloan Plan that the prior and superior water rights of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation were adversely impacted by the Whitney Irrigation Pro-

ject and that a physical solution was possible by building the Rocky Ford Dam site and irrigating Indian within the Pine Ridge Indian Reservation. Subsequent investigations by the Bureau of Reclamation identified the Slim Butte Reservoir as an alternate storage site. Reclamation described that project as compatible with the present level of water resources development in Nebraska, immediately south of the boundary of the Pine Ridge Indian Reservation. As late as 1977, the Bureau of Reclamation acknowledged the prior and superior rights of the Oglala Sioux Tribe but proceeded nevertheless to assist the Whitney Irrigation Project with rehabilitation and upgrading of its facilities:

> *"On September 13, 1973, the regional loan engineer and chief, water and land of the Missouri-Oahe project office, met with members of the District, board members, and District's Attorney to discuss the potential project. Representatives of the Fish & Wildlife Service, Soil Conservation Service, and Nebraska Department of Water Resources participated in the meeting. Based on discussions with the Bureau, the District subsequently requested the Bureau for an opinion on the water rights of the Whitney Irrigation District, particularly with respect to the downstream Indian reservation. (Bureau of Reclamation, 1977).*
>
> *"Please be advised that we have examined the report [of Whitney Irrigation District] and believe it to be legally sufficient. The sponsor is an irrigation district organized, qualified, and under State law to, among other things, enter into contracts with the United States, acquire lands and interest in lands and hold water rights."* (Bureau of Reclamation, 1977).

The Governor of Nebraska, on January 10, 1977, confirmed that the State of Nebraska recognized the water rights of the Whitney Irrigation District:

> *"The application for a Small Reclamation Project Loan submitted by the Whitney Irrigation District appears to be financially feasible. In addition, water rights claimed by the applicant are adequate and valid. Therefore, I would recommend that the loan application of the Whitney Irrigation District be forwarded to the Secretary of the Interior for consideration."* (Exxon 1977).

It is clear from the foregoing that the United States knew that the Whitney Irrigation Project dominated the dependable water supplies of the White River and that additional storage facilities were needed (under the circumstances of the Whitney Irrigation Project) on the Pine Ridge Indian Reservation to accomplish irrigation using the prior and superior water rights of the Oglala Sioux Tribe. Nevertheless, the United States did not proceed to resolve the water rights conflict between the Oglalas and the inferior claimants of the Whitney Irrigation District. Reclamation assisted the District as recently as 1977 in the rehabilitation of its project. Both the Oglala Sioux and Rosebud Sioux Tribes are affected by the Whitney Irrigation Project and the actions by the United States respecting the White River.

The plans for the future development of the Cheyenne River in the Pick-Sloan Plan were as follows:

> *"...Cheyenne River is the largest tributary of the Missouri in South Dakota....One other reclamation project has been authorized, namely the*

Angostura project in the southwest part of the Cheyenne River watershed, whereby the construction of Angostura Reservoir with a capacity of 160,000 acre-feet water can be supplied by gravity to a 16,000 acre project in the vicinity of Hot Springs, S. Dak., and to 25,300 acres in 49 scattered pumping units along the lower reaches of the River..." (Senate Document 191, pg. 76).

The Cheyenne River is the source of *Winters* doctrine rights to the use of water of the Oglala Sioux of the Pine Ridge Indian Reservation and the Cheyenne River Sioux of the Cheyenne River Indian Reservation. Despite the potential announced in the Pick-Sloan Plan for development of part of the project on the Pine Ridge and Cheyenne River Indian Reservations, the Angostura project was constructed by the Pick-Sloan Plan, exclusively on non-Indian Lands, upstream from both Pine Ridge and Cheyenne River reservations.

For the past 90 years, there has been a consistent pattern of developing Bureau of Reclamation projects on the Missouri River basin that rely upon Indian land and water. The physical supplies available to the Tribes (both quantity and quality) have been diminished to the point that they are unusable by the Tribes. The Secretaries of the Departments of Interior and Army were constantly aware of the prior and superior rights of the Tribes, but in conjunction with state water resource agencies, assisted in development of water projects with inferior state-created water rights. Today, the Indian Tribes of the Missouri River basin, particularly in Montana and Wyoming, are being forced into State Court for the purpose of guaranteeing that the Bureau of Reclamation and private irrigation projects can continue at their present level of development without the necessity of yielding to the superior rights of the Tribes.

WILLISTON BASIN
INTERSTATE PIPELINE COMPANY
A Subsidiary of MDU Resources Group, Inc

P.O. Box 131
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October 8, 1993

To: Senator Max Baucus

Please consider the ideas brought forth during the meeting held on October 11, 1993 in Glendive, Montana.

A summary of my comments are as follows:

1. Natural gas peaking plants would conserve water while reducing the impact of fluctuating water levels both upstream and downstream of hydroelectric plants.

2. The benefits associated with natural gas fired peaking could be enjoyed by both outdoor enthusiasts and barge operators.

3. There are currently natural gas pipelines in close proximity to the hydroelectric dams of Fort Peck and Garrison.

4. Williston Basin Interstate Pipeline Company would be happy to assist in any feasibility study to determine costs associated with natural gas supply.

I realize that extensive research would be required to properly calculate the feasibility of natural gas fired peaking but the benefits of the idea substantiate the need for consideration.

Please contact me if you have any questions.

Sincerely,

WILLISTON BASIN INTERSTATE PIPELINE COMPANY

Craig Wagner

Craig Wagner
Safety Director

Dear Senator Max Baucus 10-3-93

I received your announcement at the meeting in Glendive on Missouri River, as your the Chairmen. I am not sure I can make this meeting 10-11-93. However, I am expressing a idea of discussion for this meeting.

Due to the rainfall and flooding Downstream and Ft Peck Dam being low on water, Milk River is the area of my letter.

Some place along the Milk River there needs to be another small Dam, such as the Vandalia Dam West of Glasgow, and a irrigation Canal. Its location Could have differed water from the Milk River to Ft. Peck Lake with a Constant flow By regulating the water from a Canal to Ft Peck By openery up gates, about like the spillway at Ft Peck, excessive water Could be diverted from Dam to the lake for storage and help secure water level that Dam. possibly Could be located Around the Glasgow area. This would have helped some flooding Down stream and helped the other Dams

Before Ft. Peck Control output also Ft. Peck Dam could have been a higher level of water storage to insure, Barge traffic below, but also to maintain a proper lake level for recreation, Etc. Water is a important commodity we need look at more ways to store water, and Control flooding this Dam proposed might be a helpful means to our society in every way. thanks for for Working for Montana!!

Sincerely
Frank R. Ulers

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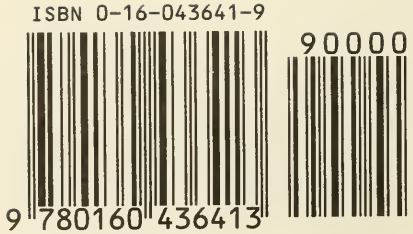
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